Institution Credit

Term : 2021 Fall

College
Law, Beasley School

Major
Law--Full Time

Student Type
First Time Professional

Academic Standing
Not Calculated

Additional Standing
Dean's List

Term Comments
Semester Notations:

DCP (Civil Procedure I)

Subject	Course	Campus	Level	Title	Grade	Credit Hours	Quality Points	R	CEU Contact Hours
JUDO	0402	Main	LW	Civil Procedure I Ramji-Nogales, J	A	4.000	16.00		
JUDO	0406	Main	LW	Contracts Lipson, J	A+	4.000	16.00		
JUDO	0414	Main	LW	Legal Research & Writing Kaplan, R	B+	3.000	9.99		
JUDO	0420	Main	LW	Torts Culhane, J	A	4.000	16.00		
JUDO	0437	Main	LW	Intro to Transactional Skills Monroe, A	S	1.000	0.00		

Term Totals	Attempt Hours	Passed Hours	CEU Hours	GPA Hours	Quality Points	GPA
Current Term	16.000	16.000	16.000	15.000	57.99	3.87
Cumulative	16.000	16.000	16.000	15.000	57.99	3.87

Term : 2022 Spring

College
Law, Beasley School

Major
Law--Full Time

Student Type
Continuing Degree Seeking

Additional Standing
Dean's List

Term Comments
Semester Notations:

Tie-BP (Legal Research & Writing II)

DCP (Constitutional Law)

Subject	Course	Campus	Level	Title	Grade	Credit Hours	Quality Points	R	CEU Contact Hours
JUDO	0404	Main	LW	Constitutional Law Green, R	A	4.000	16.00		
JUDO	0410	Main	LW	Criminal Law I Deguzman, M	A	3.000	12.00		
JUDO	0414	Main	LW	Legal Research & Writing Kaplan, R	A	2.000	8.00		
JUDO	0418	Main	LW	Property Baron, J	B+	4.000	13.32		
JUDO	0600	Main	LW	Taxation Abreu, A	A	3.000	12.00		

Term Totals	Attempt Hours	Passed Hours	CEU Hours	GPA Hours	Quality Points	GPA
Current Term	16.000	16.000	16.000	16.000	61.32	3.83
Cumulative	32.000	32.000	32.000	31.000	119.31	3.85

Term : 2022 Summer I

College
Law, Beasley School

Major
Law

Student Type
Continuing Degree Seeking

Subject	Course	Campus	Level	Title	Grade	Credit Hours	Quality Points	R	CEU Contact Hours
JUDO	W510	Main	LW	Institutional Decision Making	B+	3.000	9.99		
JUDO	W910	Main	LW	Law and Public Policy Knauer, N	A	3.000	12.00		

Term Totals	Attempt Hours	Passed Hours	CEU Hours	GPA Hours	Quality Points	GPA
Current Term	6.000	6.000	6.000	6.000	21.99	3.67
Cumulative	38.000	38.000	38.000	37.000	141.30	3.82

Term : 2022 Fall

College
Law, Beasley School

Major
Law--Full Time

Student Type
Continuing Degree Seeking

Additional Standing
Dean's List

Subject	Course	Campus	Level	Title	Grade	Credit Hours	Quality Points	R	CEU Contact Hours
JUDO	0540	Main	LW	Evidence Ouziel, L	B+	3.000	9.99		
JUDO	0902	Main	LW	Guided Research Serial - Legal History Workshop Green, R	A+	3.000	12.00		
JUDO	0905	Main	LW	Temple Law Review Reinstein, R	CR	3.000	0.00		
JUDO	1025	Main	LW	Law and Public Policy II	A	3.000	12.00		

Term Totals	Attempt Hours	Passed Hours	CEU Hours	GPA Hours	Quality Points	GPA
Current Term	12.000	12.000	12.000	9.000	33.99	3.78
Cumulative	50.000	50.000	50.000	46.000	175.29	3.81

Term : 2023 Spring

College
Law, Beasley School

Major
Law--Full Time

Student Type
Continuing Degree Seeking

Academic Standing
Not Calculated

Last Academic Standing
Not Calculated

Subject	Course	Campus	Level	Title	Grade	Credit Hours	Quality Points	R	CEU Contact Hours

Subject	Course	Campus	Level	Title	Grade	Credit Hours	Quality Points	R	CEU Contact Hours
JUDO	0400	Main	LW	Administrative Law Green, R	A	3.000	12.00		
JUDO	0416	Main	LW	Professional Responsibility Bachar, G	A-	3.000	11.01		
JUDO	0532	Main	LW	Criminal Procedure I Ouziel, L	A	3.000	12.00		
JUDO	0558	Main	LW	Intro to Trial Advocacy Scott, K	S+	3.000	0.00		

Term Totals	Attempt Hours	Passed Hours	CEU Hours	GPA Hours	Quality Points	GPA
Current Term	12.000	12.000	12.000	9.000	35.01	3.89
Cumulative	62.000	62.000	62.000	55.000	210.30	3.82

Transcript Totals

Transcript Totals - (Law)	Attempt Hours	Passed Hours	CEU Hours	GPA Hours	Quality Points	GPA
Total Institution	62.000	62.000	62.000	55.000	210.30	3.82
Total Transfer	0.000	0.000	0.000	0.000	0.00	0.00
Overall	62.000	62.000	62.000	55.00	210.30	3.82

Course(s) in Progress

Term : 2023 Fall

College
Law, Beasley School

Major
Law--Full Time

Student Type
Continuing Degree Seeking

Subject	Course	Campus	Level	Title	Credit Hours
JUDO	0542	Main	LW	Federal Courts and Jurisdiction	3.000
JUDO	0726	Main	LW	Federal Judicial Clerkship	3.000
JUDO	1039	Main	LW	Race and the Law	3.000

June 12, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

Asher Young is one of the most exceptional and successful members in his class, and he is certainly one of the most capable students I have known in several years. Asher was a double-major student-athlete at Wesleyan University, and he worked for several years at Bennett Midland, a strategic consultant that works exclusively with government agencies and non-profit entities. Asher was attracted to Temple Law School by one of our most prestigious merit scholarships, and his performance has fully justified those expectations: earning a 3.82 GPA despite the law school's 3.10 curve, chosen as an Articles Editor by his Law Review peers, and selected by faculty for the highly competitive Clerkship Honors Program. (In Asher's case, the latter will entail a year-long internship for Judge Marjorie Rendell of the Third Circuit.) I recommend Asher very highly for a post-graduation clerkship, and I hope you will give his application very close attention.

I know Asher from three contexts. First, he was a student in my sixty-five-person constitutional law class, which began on zoom before shifting to the classroom. He sat in the third row, slightly right of center, and was one of the most thoughtful participants in the class. Every week or two, he would stay after class for further discussion of some issue or question. These encounters quickly indicated Asher's extraordinary talent, maturity, and professionalism, all of which would be strongly confirmed by our further interactions in 2022-2023. It was no surprise that Asher's anonymously-graded exam was one of the top three in the large constitutional law course. Many aspects of his exam answer were excellent, but perhaps most extraordinary was his distinctive ability to perceive connections between technical doctrines and public values without any kind of distortion in his legal judgment.

Second, based on Asher's performance in constitutional law, I invited him to participate in an elite hand-picked Legal History Workshop. For several years, I have organized such "guided research assistant" seminars so that the law school's best students can develop stronger skills as editors and writers, ideally with the goal of preparing them for a judicial clerkship. I asked Asher and four other top-performing students to work with me in studying the history of affirmative action. Students were required to write papers on specifically assigned topics. The semester included four research-oriented meetings, with group discussion about each student's strategies, progress, and challenges. There were also four writing-oriented meetings, when students themselves led interactive discussions about one another's completed papers with close attention to composition, substance, and style.

I think that very few law schools anywhere in the country require high-performing students to share papers and comments with each other, yet I believe this process of writing, editing, and exchanging papers can yield extraordinary growth. I provided written comments on each paper, but the main goal was for students like Asher to become better editors of one another, so that they can more precisely edit their own writing. The seminar's grades were based not only on written products, but equally on the ability to generate productive suggestions and criticism for others. Asher researched topics and materials that were completely new and unfamiliar, including affirmative action in the military, Yale law's pathbreaking admissions policy during the 1960s, and social science about diversity in the judiciary. Asher had to plan ahead and be self-motivated, seeking help where necessary so that the work could be on point and efficient. Most of all, Asher had to deliver high-quality results on a very tight schedule, for a uniquely small audience of myself and strong student peers who were attentive, constructive, critical, and respectful.

Asher thrived and excelled in this unsheltered, high-pressure environment, maintaining a consistent focus on achieving even greater self-improvement. Likewise, I was able to see Asher perform across an exceedingly wide range of circumstances, including peer-interaction about substantively sensitive topics and productive responses to direct criticism. The breadth and depth of Asher's work during that semester represent the primary basis for my confidence and enthusiasm about his clerkship application. Asher earned a grade of A+ even when his work was directly compared to some of the law school's most talented students.

Third, Asher was a student in my fifty-eight-student administrative law, which was packed with talented students, including some of the most accomplished students from 2023's graduating class. Without making this letter any longer than necessary, Asher's performance was exactly as I would have expected from our prior experience, and it was especially similar to his performance in constitutional law. Asher was in no sense overactive with questions and discussions, yet he was very consistently excellent, navigating the peculiar and dynamic universe of administrative law with relentless curiosity, unwavering humility, and good cheer. Once again, Asher's anonymously-graded exam was among the top handful in an exceedingly talented class of students.

In eighteen years of teaching, thirty-seven of my research assistants have been fortunate to receive federal district clerkships, and nine have clerked in federal courts of appeals. Based on my experience, I believe that Asher's talent, diligence, and personality would position him near the very top of that accomplished group. I think Asher is an outstanding student, very easy to work with, who would be a superb asset in any judicial chambers. Long ago, I was a law clerk for Judge Louis Pollak and Judge Merrick Garland, and those experiences showed me the kind of skills and disposition that law clerks must have to succeed. I believe that Asher is a substantively excellent, personally delightful, zero-risk candidate for any high-pressure, high-quality legal workplace, especially including a judicial chambers. I hope you will give his application careful consideration, and if I can be helpful in any way, whether by email (greenc@temple.edu), cell phone (215-880-0374), or otherwise, I would be very happy to do that.

Green Craig - craig.green@temple.edu - 215-880-0374

Sincerely,

Craig Green

Professor of Law
Temple University

June 12, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I write in enthusiastic support of Asher Young's application for a clerkship in your chambers. I am Associate Dean for Research and the I. Herman Stern Research Professor at Temple University's Beasley School of Law, where Asher was a student in my Civil Procedure I course in his first semester of law school. His performance in that course was outstanding, and he has continued to meet with me regularly to discuss his course selection and career plans. I have been continually impressed with Asher's superb analytical skills, his exceptional writing abilities, his highly developed organizational skills and self-starter nature, his close attention to detail, and his pleasant and professional demeanor. For all of these reasons, I invited Asher to act as a Teaching Assistant for my Civil Procedure I course this fall, selecting his application from a competitive process with many strong candidates. I can think of few more persuasive arguments that you should hire Asher to work in your chambers than to say that I have hired him myself.

From the first week of our Civil Procedure course, Asher served as a class leader in contextualizing and articulating challenging concepts during class discussion. He consistently raised insightful and probing questions that weaved together different sections of the course, providing clarity for his peers on how to approach complex legal questions with diligence and care. His writing in the course – consisting of a draft complaint, a practice midterm, and the final exam – exemplified these same qualities, demonstrating a thorough understanding of the material and exceptional analytic skill. As you know Civil Procedure I is one of the most challenging first year courses, and my goal as a professor is to consistently push students outside of their comfort zone. My final exam consists of a four-hour, complex hypothetical fact pattern that requires students to spot issues, identify the relevant legal rule, apply it to the salient facts, argue both sides, and organize their answer effectively, all under serious time pressure. Asher received one of the top three grades in the class of seventy students. I have since used his exam as a model answer for my Civil Procedure students because of its cogency and quality of analysis. I also awarded Asher Distinguished Class Performance to recognize his exceptional contributions to classroom discussions.

Since his first semester, I have continued to work with Asher as an academic advisor. I have been impressed by his organizational skills and attention to detail. As an advisor, I have met regularly with Asher to help tailor his courses to support his commitment to public service. Throughout these discussions, Asher has taken a measured and considered approach to academic planning, particularly in determining how to best pursue his interests in administrative law and public policy. Even alongside his law review and student organization responsibilities, Asher routinely provides detailed agendas and questions in advance of our meetings. Our conversations are thorough and nuanced, and Asher has shown himself as a self-starter and critical thinker throughout our work together.

Asher's work ethic and positive demeanor have made him a valuable part of the Temple Law community, and I am thrilled to receive his support next semester as a Civil Procedure Teaching Assistant. Asher's professionalism and commitment to serving others makes him well-prepared to help first-year students navigate difficult topics during their first semester of law school, and I very much look forward to working with him and seeing his own mentorship skills flourish next fall.

For all of these reasons, I believe that Asher would make an excellent law clerk: he has demonstrated outstanding analytical and writing abilities, strong attention to detail, and a robust work ethic. Please feel free to contact me at jayarn@temple.edu with any questions about Asher.

Very Truly Yours,

Jaya Ramji-Nogales
Associate Dean for Research
I. Herman Stern Research Professor

June 12, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I write this letter in support of the clerkship application of Asher Young. I recommend Mr. Young enthusiastically and without reservation. Mr. Young is an extremely talented law student who engages the law with enthusiasm, professionalism, and a keen attention to detail. He is an excellent and persuasive writer and advocate with first-rate research and analytic skills. Mr. Young is also a leader in the Temple Law community and has been very involved with both the American Constitution Society and out student public interest organization.

I have been working with Mr. Young since his first year of law school when he applied for our highly prestigious Law & Public Policy (L&PP) Program. That year, we had three times as many applications as we had spots. As a L&PP Scholar, Mr. Young secured an internship with the Administrative Conference of the United States and wrote an excellent policy paper on federal regulatory reform. His paper was so well written and extensively researched that I recommended that he submit his paper to the annual meeting of the Law & Society Association, which is an interdisciplinary and international organization. I was not at all surprised when Mr. Young's paper was selected for the conference, and I am proud to report that he will have the opportunity to present his paper at the annual meeting in San Juan this summer on a panel that includes law professors and policy makers from around the world.

Since entering law school, Mr. Young has secured a number of highly prestigious internships where he has excelled, and next year he will be participating in our Federal Judicial Clerkship Clinical. Prior to law school, Mr. Young worked for a consulting firm in New York City that supported nonprofit organizations and government entities. Through his work at the consulting firm, Mr. Young gained problem solving experience and was involved with many innovative initiatives, including providing technical assistance to elected municipal officials who were developing equity and inclusion programs.

In short, Mr. Young is an exceptional law student. Please do not hesitate to contact me if there are any questions concerning his qualifications or abilities.

Sincerely,

Nancy J. Knauer
SHELLER PROFESSOR OF PUBLIC INTEREST LAW
DIRECTOR, LAW & PUBLIC POLICY PROGRAM

Asher Young – Writing Sample

2121 Market St., Apt. 314, Philadelphia, PA 19103 • asher.young@temple.edu • (413)-687-5751

This writing sample is an excerpt of a court brief that I submitted for Legal Research & Writing II, where I was asked to represent a solo practitioner debt collection attorney facing a lawsuit under the federal Fair Debt Collection Practices Act (FDCPA). The table of authorities and statement of the case have been cut for length.

INTRODUCTION

Ms. Pearlman is entitled to summary judgment in this civil action under the federal Fair Debt Collection Practices Act (FDCPA). Ms. Freamon filed this action against Ms. Pearlman, seeking damages for Ms. Pearlman's alleged violations of the FDCPA. The FDCPA specifically establishes a "bona fide error defense" where a debt collector may not be held liable for violating the Act if it shows its violation was not intentional, resulted from a bona fide error, and that it maintained procedures reasonably adapted to avoid any such error. This provision protects debtors by incentivizing debt collectors to employ due diligence practices to prevent them from violating the FDCPA. The provision also shields debt collectors from civil liability in cases where they attempted to comply with the statute but violated the Act unintentionally.

Ms. Freamon has not shown there is a genuine dispute of any material fact in this proceeding. Ms. Pearlman is familiar with the FDCPA and did not intend to violate the Act. Further, Ms. Pearlman's alleged violation is a bona fide error because it resulted from a clerical error in the Philadelphia Court of Common Pleas' online docket system. Ms. Pearlman also maintains procedures reasonably adapted to avoid making such errors, including several practices designed to avoid filing suits on uncollectible debts.

For the reasons that follow, Ms. Pearlman respectfully submits that she is entitled to summary judgment in this civil action as a matter of law.

Asher Young – Writing Sample

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QUESTION PRESENTED

Is Defendant entitled to summary judgment under 15 U.S.C. § 1692(k)(c) where her alleged violation was the result of a spelling error by the Philadelphia Court of Common Pleas, she did not intend to violate the FDCPA, and she maintained procedural safeguards reasonably adapted to avoid clerical errors?

(The procedural history and statement of facts have been cut for length.)

ARGUMENT

In 1977, Congress enacted the Fair Debt Collection Practices Act ("FDCPA") to eliminate abusive debt collection practices, protect consumers, and to ensure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged. 15 U.S.C. § 1692. Specifically, 15 U.S.C. § 1692(k)(c) provides an affirmative defense for debt collectors who did not intend to violate the FDCPA, and whose alleged violations resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error. 15 U.S.C. § 1692(k)(c). The "bona fide error" defense is an important "safety hatch" of the FDCPA because the Act authorizes damages in excess of the actual cost incurred by the victim of a violation, providing an incentive for debt collectors to take necessary precautions to avoid such violations. *Ross v. RJM Acquisitions Funding LLC*, 480 F.3d 493, 495 (7th Cir. 2007).

To determine whether Ms. Pearlman, the defendant in this case, is entitled to summary judgment, this court must assess whether she is protected by the "bona fide error" defense. If this court finds Ms. Pearlman has shown by a preponderance of the evidence that (1) her alleged FDCPA violation was unintentional; (2) the alleged violation resulted from a bona fide error; and

Asher Young – Writing Sample
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(3) she maintains procedures reasonably adapted to avoid such errors, it must grant summary judgment to Ms. Pearlman.

To win summary judgment, Ms. Pearlman must show "that there is no genuine dispute as to any material fact and [she] is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Summary judgment is proper where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552 (1986). A fact is "material" under Rule 56 if its existence or nonexistence might impact the outcome of the suit under the applicable substantive law. *Santini v. Fuentes*, 795 F.3d 410, 416 (3d Cir. 2015) (quoting *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)).

As the moving party, Ms. Pearlman's burden in this case is to show that there is an "absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S. Ct. 2548, 2554 (1986). Meanwhile, the nonmoving party, Ms. Freamon, must designate "specific facts showing that there is a genuine issue for trial." *Id.* at 324.

Ms. Freamon has not introduced any evidence that shows any genuine issue of material fact as to whether Ms. Pearlman's alleged FDCPA violation was unintentional, whether it was due to a bona fide error, or whether she maintains procedures reasonably adapted to protect against such errors. Whether a debt collector maintains "reasonably adapted" procedures is an objective inquiry which focuses on the orderliness and regularity of the debt collector's error-prevention steps. *Johnson v. Riddle*, 443 F.3d 723, 729 (10th Cir. 2006); *Abdollahzadeh v. Mandarich Law Grp., LLP*, 922 F.3d 810, 817 (7th Cir. 2019) (quoting *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich, L.P.A.,* 559 U.S. 573, 587, 130 S. Ct. 1605, 1614-15 (2010)). There is no evidence in the record

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that shows any genuine issue of material fact as to whether Ms. Pearlman regularly conducts computerized searches before filing debt collection suits, whether she maintains an agreement with Midland that all files it transmits for collection are legitimate and collectible debts, or whether she regularly attends the Pennsylvania Bar Institute's FDCPA training. Pearlman Dep. at 4-5. Thus, Ms. Pearlman is entitled to summary judgment under 15 U.S.C. § 1692(k)(c), absolving her of liability for any alleged FDCPA violations in the present case.

1. Ms. Pearlman is entitled to summary judgment under 15 U.S.C. § 1692(k)(c) because her alleged FDCPA violation was not intentional and resulted from a bona fide error.

A debt collector may not be held liable for violating the FDCPA if their violation was not intentional and resulted from a bona fide error, notwithstanding the maintenance of procedures reasonably adapted to avoid any such error. 15 U.S.C § 1692(k)(c). To avail herself of this defense, Ms. Pearlman must establish by a preponderance of the evidence that (1) her alleged violation was unintentional, (2) her alleged violation resulted from a bona fide error, and (3) the bona fide error occurred despite procedures designed to avoid such errors. *Beck v. Maximus, Inc.*, 457 F.3d 291, 297-98 (3d Cir. 2006).

A debt collector only needs to show that its FDCPA violation was unintentional, not that its actions were unintentional. *Kort v. Diversified Collection Servs.*, 394 F.3d 530, 537 (7th Cir. 2005). To hold otherwise would effectively negate the bona fide error defense. *Lewis v. ACB Bus. Servs.*, 135 F.3d 389, 402 (6th Cir. 1998). In this case, Ms. Pearlman did not intend to violate the FDCPA, as evidenced by her withdrawing the debt collection suit against Ms. Freamon shortly after learning Midland had previously sued her on the same debt. Pearlman Dep. at 1.

Asher Young – Writing Sample
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The "bona fide error" included in 15 U.S.C. § 1692(k)(c) refers to "clerical or factual mistakes" because it is easier for debt collectors to implement procedures to avoid clerical errors than those applicable to legal reasoning. *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich, L.P.A.*, 559 U.S. 573, 587, 130 S. Ct. 1605, 1614-15 (2010). A clerical error is "merely of recitation, of the sort that a clerk or amanuensis might commit, mechanical in error." *United States v. Clark*, 671 F. App'x 25, 25-26 (3d Cir. 2016). Because it was caused by a spelling error by the Philadelphia Court of Common Pleas in the case caption of the civil docket report for Midland's prior lawsuit against Ms. Freamon, Ms. Pearlman's error must be considered clerical in nature. Pierce Dep. at 2; Freamon Complaint at Ex. A.

1.1 Ms. Pearlman did not intend to violate the FDCPA and promptly withdrew the lawsuit when she learned Midland had previously sued Ms. Freamon on the same debt.

To avail herself of the "bona fide error" defense included in U.S.C. § 1692(k)(c), Ms. Pearlman "must only show that the [FDCPA] violation was unintentional, not that the [lawsuit] itself was unintentional." *Lewis v. ACB Bus. Servs.*, 135 F.3d 389, 402 (6th Cir. 1998) (holding that defendant debt collector did not violate the FDCPA by making a collection call to debtor where debtor's account had been miscoded as a new referral instead of a reopening). Deliberately taking a debt collection action against a debtor, despite its "intentional" nature, does not negate the bona fide error defense. *Kort v. Diversified Collection Servs.*, 394 F.3d 530, 537 (7th Cir. 2005). The Tenth Circuit has determined this to be "the only workable interpretation of the intent prong," since determining "intent" ultimately "becomes principally a credibility question as to the defendants' subjective intent to violate the [FDCPA]." *Johnson v. Riddle*, 443 F.3d 723, 728 (10th Cir. 2006).

Asher Young – Writing Sample
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Ms. Pearlman is aware of the FDCPA and regularly attends the Pennsylvania Bar Association's training on the statute. Pearlman Dep. at 4. She is also an active member of ACA International, a trade group that helps debt collectors comply with and implement the Act. Pearlman Dep. at 4; *FDCPA Compliance Center*, ACA International. (2022), https://www.acainternational.org/compliance/fdcpa-compliance-center/. When she learned that Midland had previously filed a lawsuit against Ms. Freamon on the same debt, Ms. Pearlman withdrew her complaint. Pearlman Dep. at 1. Further, Ms. Pearlman employs several procedures to avoid violating the FDCPA, and has previously declined to proceed with cases where Midland had previously sued a debtor. Pearlman Dep. 3-4.

Some courts have labeled the intent prong of the "bona fide error" defense a "subjective" test, instead choosing to focus their analysis on the latter two "objective" prongs of the test to determine whether a debt collector is entitled to the defense as a matter of law. *Johnson v. Riddle*, 443 F.3d 723, 728-29 (10th Cir. 2006). See also *Rush v. Portfolio Recovery Assocs. LLC*, 977 F. Supp. 2d 414, 427 (D.N.J. 2013). There is no evidence in the record to show Ms. Pearlman's alleged FDCPA violation was intentional, and her dedication to FDCPA education and her actions as an attorney in other prospective debt collection lawsuits make it clear she did not intend to violate the Act in this case.

1.2 Ms. Pearlman's alleged violation was the result of a clerical error in the Philadelphia Court of Common Pleas' online docket system.

FDCPA violations are forgivable under U.S.C. § 1692(k)(c) where they result from "clerical or factual mistakes," not mistakes of law. *Daubert v. NRA Grp., LLC*, 861 F.3d 382, 394 (3d Cir. 2017). A clerical mistake is one that "involves a failure to accurately record a statement or action

Asher Young – Writing Sample
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by the court or one of the parties." *United States v. Bennett*, 423 F.3d 271, 277-78 (3d Cir. 2005). The Supreme Court has specified that U.S.C. § 1692(k)(c) applies to clerical or factual mistakes because the statute attempts to evaluate "mechanical or other such 'regular orderly' steps to avoid mistakes—for instance, the kind of internal controls a debt collector might adopt to ensure its employees do not … make false representations as to the amount of a debt." *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich, L.P.A.*, 559 U.S. 573, 587, 130 S. Ct. 1605, 1614 (2010).

In this case, the Philadelphia Court of Common Pleas misspelled Ms. Freamon's surname as "Freeman" in the case caption of the civil docket report for Midland's prior lawsuit against Ms. Freamon. Pierce Dep. at 2; Freamon Complaint at Ex. A. This type of "failure to accurately record a statement … by the court" is most aptly characterized as a clerical error. *Bennett*, 423 F.3d at 271. There is no evidence in the record that shows Ms. Pearlman committed any legal errors, defined by the Supreme Court as any error that is the "product of an attorney's erroneous interpretation of the FDCPA, [such as misinterpreting the] Act's definition of 'debt collector.'" *Jerman*, 559 U.S. at 595. Rather, Ms. Pearlman's alleged FDCPA violation was caused by a mere spelling discrepancy, making it a clerical error covered by U.S.C. § 1692(k)(c).

In *Ross*, the Seventh Circuit ruled in favor of a debt collector in a similar case involving spelling discrepancies. *Ross v. RJM Acquisitions Funding LLC*, 480 F.3d 493 (7th Cir. 2007) (granting summary judgment for defendant debt collector under the "bona fide error" defense where it mailed multiple dunning letters to a debtor before realizing the creditor had spelled the debtor's name differently from the bankruptcy court, which had previously discharged the debt). Before filing a debt collection suit, Ms. Pearlman directs her legal assistant to search the debtor's name in the relevant county's court records to make sure they have not previously been sued. Pearlman Dep. at 3. Similarly, the debt collector in *Ross* was "mindful of its legal duty not to dun a

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discharged bankrupt, and to that end conducted a computerized search of bankruptcies." *Ross*, 480 F.3d at 497. However, because the official bankruptcy records in *Ross* were filed under "Delisa Ross" and the name on the account sold to the debt collector was "Lisa Ross," the debt collector's computerized search failed to return any results showing the debt had been discharged. *Id.* at 497. Similarly, Ms. Pearlman's search of Philadelphia court records was based on the spelling of Ms. Freamon's name provided to her by Midland Funding. Pierce Dep. at 2.

In *Ross*, the Seventh Circuit found the debt collector's spelling discrepancy to be a "bona fide error" and immediately proceeded to an analysis of whether its safeguard procedures were "reasonably adapted" to avoid any such error. *Ross*, 480 F.3d at 497. Ms. Pearlman's alleged FDCPA violation was similarly due to the failure of a computerized search to return any prior cases involving the defendant debtor, and thus may be characterized similarly as a "clerical" and "bona fide" error.

2. Ms. Pearlman is entitled to summary judgment because she maintained procedures reasonably adapted to avoid unintentional errors that might result in FDCPA violations.

A debt collector may not be held liable for violating the FDCPA where she did not intend to violate the FDCPA, and where her alleged violations resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error. 15 U.S.C. § 1692(k)(c). The "bona fide error" defense does not require a debt collector to employ "state of the art" procedures to avoid errors that might violate the FDCPA. *Ross*, 480 F.3d at 498. Rather, the FDCPA "only requires collectors to adopt reasonable procedures" to avoid such mistakes. *Hyman v. Tate*, 362 F.3d 965, 968 (7th Cir. 2004).

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In this case, the court must determine whether Ms. Pearlman adopted "reasonable procedures" to avoid making clerical errors. Ms. Pearlman's safeguard procedures include: (1) working with her legal assistant to carefully review Philadelphia's court records for the last names of all potential defendants; (2) holding an agreement with Midland Funding that all of its debt collection suits are based on legitimate and collectible debts with no bankruptcy discharges or any other type of problem; and (3) attending annual FDCPA trainings conducted by the Pennsylvania Bar Institute, the official Continuing Legal Education Arm of the Pennsylvania Bar Association. Pearlman Dep. at 4; *About PBI*, Pennsylvania Bar Institute. (March 2022), https://www.pbi.org/about-pbi.

In assessing Ms. Pearlman's procedures, the court should take guidance from the Supreme Court and focus "on the orderliness and regularity of the debt collector's error-prevention steps, not on the number or complexity of those steps." *Abdollahzadeh v. Mandarich Law Grp., LLP*, 922 F.3d 810, 817 (7th Cir. 2019) (quoting *Jerman*, 599 U.S. at 587) (holding the bona fide error defense precluded debt collector's liability for FDCPA violations because its violations were due to incorrect information received from the debt buyer, despite reasonable, regular, and orderly error-prevention procedures aimed at avoiding untimely collection attempts). Regardless of whether a debt collector's procedures are "imperfect" or "unquestionably simple," the court may still find they qualify under 15 U.S.C. § 1692(k)(c) if they are regular and orderly error-prevention procedures. *Abdollahzadeh*, 922 F.3d at 817.

Ms. Pearlman regularly conducts orderly error-prevention procedures ahead of filing debt collection cases. Pearlman Dep. at 3-4. She directs her legal assistant, Mr. Pierce, to carefully review the relevant court dockets before filing debt collection suits to make sure there are no previous cases filed against that debtor. Pearlman Dep. at 3-4. In his deposition, Mr. Pierce also

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described his duties in detail in a "typical debt collection case," including searching the computerized court records in whatever county the debtor lives to make sure there are no bankruptcy filings by the debtor or previous cases with the debtor. Pierce Dep. at 1-2. Additionally, since debt collection cases became the "main part" of Ms. Pearlman's practice in 2020, she has regularly attended the Pennsylvania Bar Institute's August FDCPA training. Pearlman Dep. at 5.

Conducting a computerized search for bankruptcies under a debtor's name is a procedure "reasonably adapted" to avoid clerical errors that might violate the FDCPA. *Ross v. RJM Acquisitions Funding LLC*, 480 F.3d 493 (7th Cir. 2007). Further, in *Hyman*, the Seventh Circuit granted summary judgment for the debt collector where it relied on its creditor not to refer debtors who were in bankruptcy, and where it immediately ceased collection efforts once it learned of any bankruptcy filings. *Hyman v. Tate*, 362 F.3d 965 (7th Cir. 2004). The bona fide error defense is also available to debt collectors who reasonably rely on the opinion of an organization with expertise in the relevant area of law. *Ruth v. Triumph P'Ships*, 577 F.3d 790, 805 (7th Cir. 2009).

2.1 Ms. Pearlman directs her legal assistant to carefully review Philadelphia court records for the last names of all potential defendants to make sure she will not violate the FDPCA by filing a lawsuit to collect an unenforceable debt.

In determining whether a debt collector's precautions are "reasonable," courts conduct an "objective" inquiry into whether any precautions were actually implemented, and whether such precautions were reasonably adapted to avoid the specific error at issue. *Rush v. Portfolio Recovery Assocs. LLC*, 977 F. Supp. 2d 414, 427 (D.N.J. 2013). Notably, the bona fide error defense does

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not require debt collectors to take every conceivable precaution to avoid errors, but rather only requires reasonable precautions. *Beck v. Maximus, Inc*., 457 F.3d 291, 299 (3d Cir. 2006).

A computerized search for bankruptcies is a reasonable procedure to avoid dunning a discharged debt. *Ross v. RJM Acquisitions Funding LLC*, 480 F.3d 493, 497 (7th Cir. 2007). In *Ross*, the attorney representing the debt collector outsourced its computerized search for bankruptcies under the debtor's name to another firm. *Id.* at 497. In determining this procedure to be reasonable, the court weighed the cost of investing in more advanced search procedures against the "slight aggregate harms resulting from the handful of dunning letters that modest procedures occasionally let through the sieve." *Id.* at 498.

Ms. Pearlman is aware that Midland Funding files many lawsuits, and she undertakes computerized search procedures like those in *Ross* to avoid any errors that would violate the FDCPA. Pearlman Dep. at 3. Ms. Pearlman directs her legal assistant, Mr. Wendell Pierce, to carefully review the dockets from the Philadelphia Court of Common Pleas to avoid suing debtors whom Midland Funding has already sued. Pearlman Dep. at 3-4. Specifically, Ms. Pearlman directs Mr. Pierce to run the defendant's name through the dockets to make sure there are no previous cases filed against that defendant. Pearlman Dep. at 3. As recently as October 2021, Ms. Pearlman successfully used her procedure to avoid filing a lawsuit against a debtor who had previously been sued by Midland Funding. Pearlman Dep. at 3. Given her success in preventing lawsuits from being filed against debtors previously sued by Midland, and based on the court's determination in *Ross*, Ms. Pearlman's search procedure should objectively be considered a "reasonable procedure" to avoid making such an error.

In *Ross*, the Seventh Circuit also held "reasonable" procedures cannot be equated to "state of the art" procedures "at the technological frontier." *Ross*, 480 F.3d at 498. The Seventh Circuit

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reasoned that if debt collectors were required to employ such "state of the art" procedures, those who failed to immediately purchase more advanced technological functions would be sued for committing unintentional and bona fide errors whenever a more powerful search program came on the market. *Id.* at 498.

The court in *Ross* derived its reasoning from *Hyman v. Tate*, where a debt collector was protected by the bona fide error defense even where it did not establish proactive procedures, like checking court records, to ensure the accounts it received for collection were not in bankruptcy. *Hyman v. Tate*, 362 F.3d 965, 968 (7th Cir. 2004). Because the debt collector in *Hyman* had other procedures in place similar to Ms. Pearlman's, such as stopping collection activities in the event an unintentional error occurred, the debt collector was not required to employ an "expensive review system" to avail itself of the bona fide error defense. *Id.* at 968.

Although Ms. Pearlman shares her office expenses with two other attorneys, Mr. Chris Partlow and Mr. Odell Watkins, she effectively works as a solo practitioner by billing her own clients and keeping her own fees. Pearlman Dep. at 3. Ms. Pearlman already pays $300 per month to access a subscription to Lexis, which she uses to access court records from counties outside of Philadelphia. Pearlman Dep. at 3. Meanwhile, it is free to access online docket records from the Philadelphia Court of Common Pleas through its official website. Pearlman Dep. at 3.

Ms. Pearlman does not have a subscription to Bloomberg Law, which also offers access to Philadelphia's court records. Pearlman Dep. at 4. Bloomberg Law does not publish its monthly subscription costs; however, as of August 2015, Bloomberg was estimated to cost a solo practitioner approximately $475 per month, with a minimum contract length of two years. Lisa Solomon, *Choosing the Right Legal Research Tool for Your Firm*, MyCase, at 4. (August 2015), https://info.abovethelaw.com/hubfs/MyCase_eBook_Choosing_the_Right_Legal_Research_T

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ool_for_Your_Firm.pdf. Based on this estimate, accessing Bloomberg Law would more than double Ms. Pearlman's current subscription expenses. This additional cost should be considered the type of "expensive review system" explicitly not required by the court in *Hyman*. *Hyman*, 362 F.3d at 968. Thus, Ms. Pearlman's failure to subscribe to Bloomberg Law should not negate her "bona fide error" defense in this case.

In *Ross*, the court determined that even if a more complex search algorithm would have helped the debt collector find the debtor's name, "it would not make [the debtor's] case." *Ross*, 480 F.3d at 497. A debt collector's procedures must only be considered "reasonably adapted" to avoid unintentional and bona fide errors, rather than "state of the art" practices. *Id.* at 497-498. Although Bloomberg Law offers a more advanced Boolean search function not available in Philadelphia's online docket, there is nothing in the record that suggests this function would have found the spelling error that caused Ms. Pearlman's alleged FDCPA violation. Lisa Solomon, *Choosing the Right Legal Research Tool for Your Firm*, MyCase, at 4. (August 2015), https://info.abovethelaw.com/hubfs/MyCase_eBook_Choosing_the_Right_Legal_Research_Tool_for_Your_Firm.pdf. Given the regularity and orderliness of her existing computerized search procedures, Ms. Pearlman is protected by the "bona fide error" defense as a matter of law in this case.

2.2 Ms. Pearlman maintains an agreement with Midland that all files it transmits for collection are legitimate, collectible debts with no bankruptcy discharges or any other type of problem.

The bona fide error defense "does not demand perfection" of debt collectors and does not require debt collectors to independently verify the validity of the debt. *Abdollahzadeh v. Mandarich Law Grp., LLP*, 922 F.3d 810, 817 (7th Cir. 2019) (citing *Hyman*, 362 F.3d at 968). Instead, a debt collector has developed a "reasonably adapted procedure" where it has an "understanding with

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the firms that sell it debts for collection that they would not knowingly sell" discharged or otherwise uncollectible debts. *Ross*, 480 F.3d at 497. In this case, Ms. Pearlman has an agreement with Midland that all files it transmits for collection are legitimate, collectible debts with no bankruptcy discharges or any other type of problem. Pearlman Dep. at 4. Combined with her other procedures, such as computerized searches of debtors' names and attending FDCPA trainings, this agreement qualifies as a procedure reasonably adapted to avoid clerical errors.

In *Abdollahzadeh*, the Seventh Circuit held that a debt collector law firm was protected by the "bona fide error" defense even where it relied on account information provided by its creditor client that "consistently (though incorrectly) identified the last-payment date" of the debt in question. *Abdollahzadeh*, 922 F.3d at 816. The plaintiff debtor in *Abdollahzadeh* unsuccessfully argued that the "bona fide error" defense does not protect debt collectors who unreasonably rely on a creditor's representation of debts. *Id.* at 814 (citing *McCollough v. Johnson, Rodenburg & Lauinger, LLC*, 637 F.3d 939, 949 (9th Cir. 2011)). Specifically, the debtor in *Abdollahzadeh* relied on *McCollough* to argue that the presence of an "accuracy disclaimer" in the debt collector's agreement with its client made it unreasonable as a matter of law for the debt collector to rely on its client's data. *Abdollahzadeh*, 922 F.3d at 816. The Seventh Circuit, however, rejected this argument, pointing out that the debt collector in *McCollough* relied on an email from its creditor that contradicted previous information in the creditor's own account file, rather than simply relying on incorrect information originally transmitted by the creditor. *Abdollahzadeh*, 922 F.3d at 816 (citing *McCollough*, 637 F.3d at 945).

In this case, there is nothing in the record to suggest there is any sort of "accuracy disclaimer" in Ms. Pearlman's agreement with Midland, which the Ninth Circuit in *McCullough* cited as a factor in determining the debt collector's reliance on its creditor to be "unreasonable as a matter

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of law." *McCollough*, 637 F.3d at 949. Further, like the debt collector in *Abdollahzadeh*, Ms. Pearlman did not receive any communication from Midland that contradicted information in its own account file; instead, she merely relied on the account information itself. *Abdollahzadeh*, 922 F.3d at 816; Pearlman Dep. at 2.

The Ninth Circuit generally holds debt collectors to a stricter standard, explaining that debt collectors have an "affirmative obligation" to maintain reasonable procedures beyond relying on a creditor's representation of debts. *Reichert v. Nat'l Credit Sys.*, 531 F.3d 1002, 1004 (9th Cir. 2008) (ruling debt collector could not rely solely on creditor's provision of accurate information in the past as a substitute for the maintenance of adequate procedures to avoid future mistakes). However, even under this heightened standard, Ms. Pearlman would be entitled to the "bona fide error" defense because she maintains other procedures reasonably adapted to avoid discoverable errors, such as her computerized searches and regular attendance at FDCPA trainings. Pearlman Dep. at 4-5.

In *Reichert*, the debt collector unsuccessfully argued that the creditor's submission of accurate information in the past entitled the debt collector to reasonably rely on the creditor's representations of debts. *Reichert*, 531 F.3d at 1004. There was no evidence the debt collector in *Reichert* maintained any safeguard procedures other than a mere "conclusory declaration" stating that it maintained such procedures. *Id.* at 1007. Ms. Pearlman's case differs substantially, given that she reviews local court dockets to confirm whether Midland's debts are collectible, and she regularly attends FDCPA trainings. Pearlman Dep. at 4-5. The evidence in the record shows that Ms. Pearlman's safeguard practices go well above the "mere assertion" of reasonably adapted procedures offered by the debt collector in *Reichert*. *Reichert*, 531 F.3d at 1007. Even under strict standards, Ms. Pearlman's procedures show she is entitled to the "bona fide error" defense.

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2.3. Ms. Pearlman regularly attends FDCPA trainings conducted by the Pennsylvania Bar Institute, whose programs are taught by leading legal experts in their field.

While not dispositive on its own, attendance at training seminars is considered a "reasonable procedure" that helps debt collectors avoid errors and omissions that could result in an FDCPA violation. *Jenkins v. Heintz*, 124 F.3d 824, 834 (7th Cir. 1997). Even in cases where the court has ruled in favor of plaintiff debtors, training seminars are cited as "procedures which may be reasonably adapted to avoiding a clerical error." *Ruth v. Triumph P'Ships*, 577 F.3d 790, 804 (7th Cir. 2009) (quoting *Johnson v. Riddle*, 443 F.3d 723, 730 (10th Cir. 2006)).

Ms. Pearlman's case is distinguishable from both *Ruth* and *Johnson*, where the courts ruled that attending training seminars "cannot shield an attorney from liability for legal errors because such clerical procedures are mostly about the mechanics for collecting debts." *Ruth*, 577 F.3d at 804 (quoting *Johnson*, 443 F.3d at 730). Unlike the debt collectors who committed legal errors in *Ruth* and *Johnson*, Ms. Pearlman committed a clerical error when she did not find the spelling discrepancy between Midland's referral and the case caption in the online docket system for the Philadelphia Court of Common Pleas. Pierce Dep. at 2.

Ms. Pearlman has regularly attended the Pennsylvania Bar Institute's annual FDCPA training over the past two years. Pearlman Dep. at 5. The Pennsylvania Bar Institute is the continuing legal education arm of the Pennsylvania Bar Association, and its programs are taught by legal professionals who are widely recognized as the leading experts in their field. *About PBI*, Pennsylvania Bar Institute. (March 2022), https://www.pbi.org/about-pbi. Additionally, Ms. Pearlman helped train her legal assistant by showing him how to look up names in the computer indexes to check whether debtors have previously been sued. Pierce Dep. at 3. This type of in-

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house training, combined with Ms. Pearlman's attendance at the Pennsylvania Bar Institute's training sessions, constitutes a procedure reasonably adapted to avoid clerical errors.

Unlike the defendant debt collector in *Ruth*, Ms. Pearlman also does not need to prove she "reasonably relied on" an attorney or organization with expertise in the relevant area of law. *Ruth*, 577 F.3d at 804. Rather, she only must prove that attending a training seminar was a "regular orderly" step to avoid a clerical mistake. *Jerman*, 559 U.S. at 587. Based on her consistent attendance at the Pennsylvania Bar Institute's FDCPA trainings over the last two years, Ms. Pearlman's training routines should be considered "regular orderly" steps that are reasonably adapted to avoid making clerical errors. Pearlman Dep. at 5.

CONCLUSION

Ms. Pearlman has met her burden of proving that there are no genuine issues of material fact as to whether her alleged FDCPA violation was unintentional, whether it resulted from a bona fide error, and whether she maintains procedures reasonably adapted to avoid any such error. Based on these undisputed facts, Ms. Pearlman is entitled to the bona fide error defense under 15 U.S.C. § 1692(k)(c) and is entitled to summary judgment as a matter of law. For these reasons, Ms. Pearlman requests the court grant its Motion for Summary Judgment and enter judgment for Ms. Pearlman on this issue.

Applicant Details

First Name	**Evan**
Middle Initial	**D**
Last Name	**Young**
Citizenship Status	**U. S. Citizen**
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Contact Phone Number	**18043013475**

Applicant Education

BA/BS From	**James Madison University**
Date of BA/BS	**December 2015**
JD/LLB From	**Louisiana State University, Paul M. Hebert Law Center** **http://www.law.lsu.edu**
Date of JD/LLB	**May 12, 2024**
Class Rank	**30%**
Law Review/Journal	**Yes**
Journal(s)	**The Journal of Civil Law Studies**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Tullis Moot Court** **Judge John R Brown Admiralty Moot Court**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

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Corbett, William
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This applicant has certified that all data entered in this profile and any application documents are true and correct.

Evan Young
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3/31/2023

Judge Jamar K. Walker
United States District Court for the Eastern District of Virginia
600 Granby St Ste 193A,
Norfolk, VA 23510

Dear Judge Walker,

I am writing to express my strong interest in the Federal Judicial Clerkship position with the Eastern District of Virginia for the upcoming term. As a recent law school graduate with a deep passion for the law and a demonstrated commitment to public service, I believe that I possess the qualities and skills necessary to excel in this prestigious position.

Throughout law school, I have been committed to achieving academic excellence and building a strong foundation in legal research, writing, and analysis. I have also been deeply involved in extracurricular activities and pro bono work, which has allowed me to develop a wide range of skills and experiences that I believe would be valuable in a judicial clerkship role.

Specifically, my experience includes competing in both external and internal moot court competitions, interning at a federal district court and a state appellate court, and working as an editor of a peer-reviewed journal. These experiences have honed my analytical and writing abilities, as well as my ability to work effectively in a team-oriented environment.

In addition to my academic and professional achievements, I am confident that I possess the personal qualities necessary to be an effective clerk. I have strong interpersonal skills, and I can communicate effectively with a wide range of individuals, from litigants to attorneys to court personnel. I am also extremely organized and detail-oriented, which I believe would be valuable in managing complex legal cases and maintaining accurate records.

Finally, I am deeply committed to public service and to the ideals of justice and fairness that underlie our legal system. I believe that a judicial clerkship would provide me with a unique opportunity to contribute to the legal profession, to learn from accomplished judges, and to make a meaningful difference in the lives of the individuals who appear before the court.

Thank you for considering my application. I am excited about the possibility of contributing to the work of the Federal District Court, and I look forward to the opportunity to discuss my qualifications in more detail.

Sincerely,

Evan Young

Evan Young

5500 Perkins Rd., Baton Rouge, LA 70808, (804) 301-3475, eyoun43@lsu.edu

Education

Paul M. Hebert Law Center, Louisiana State University, Baton Rouge, LA
J.D./ D.C.L. Candidate, May 2024
GPA: 3.254, Rank: 30% (66/216)

- International Law Student Society: President
- Tullis Moot Court Semifinalist: 4th place Best Oralist
- LSU Admiralty External Team
- Assistant Managing Editor for the Journal for Civil Law Studies
- Cali Award: Administrative Law

James Madison University, Harrisonburg, VA
B.A., Modern Foreign Language, Concentration, Italian, December 2015

- Mahatma Gandhi Center for Global Nonviolence
- Madison Marketing Association
- Italian Club, Treasurer
- Study abroad program: Dante Alighieri Università per Stranieri di Reggio Calabria, Italy, Summer 2015

Experience

Louisiana First Circuit Court of Appeals, Baton Rouge, LA
Intern, September 2022 - Present

- Observe oral arguments
- Research and prepare memorandum for staff attorneys
- Cite check draft opinions with the record and existing law
- Assist the Judge and staff attorneys with reviewing writ applications

United States District Court for the Middle District of Louisiana, Baton Rouge, LA
Extern, May 2022- July 2022

- Worked closely with law clerks to cite check rulings that would be used by the judge
- Researched and prepared a memorandum for a motion for summary judgement on administrative appeal exhaustion under the Prison Litigation Reform Act
- Researched 5th Circuit precedent for protected speech of a government employee
- Evaluated and summarized parties' arguments in preparation for a breach of contract case
- Observed oral arguments, evidentiary hearings, jury selection, and pre- trial conferences

Republic National Distribution Company, Ashland, VA
Sales Representative, May 2017 - June 2021

- Analyzed sales data to create personalized sales plans for accounts
- Consulted with account managers to better understand issues the account might have
- Made sales suggestions based on sales data and consultation
- Met with competing sales reps to work out compromises that benefitted all parties
- Summarized sales trends and account issues to upper management to help create better sales programs

Duoc UC Universidad Católica, Santiago, Chile
Professor of English, January 2016– December 2016

- Created engaging lesson plans; managed classes of 20+ students; presented class lectures to students

Skills

Spanish – B2 (Upper Intermediate)
Italian – A2 (Upper Basic)
Proficient in Microsoft 360
Proficient with Lexis Nexis and Westlaw

Community Services

FNE International, Nicaragua – Volunteer Home Builder

LOUISIANA STATE UNIVERSITY
COLLEGE RECORD

EVAN YOUNG

ISSUED 01/09/2023 TO: STUDENT

DEGREES AWARDED:

12/2015 BA
JAMES MADISON UNIVERSITY

LOUISIANA STATE UNIVERSITY
1ST SEM 2021-2022

DEPT CRSE	GR	CARR	EARN	QPTS	
LAW 5001	P		3.00		
LAW 5003	3.3	3.00	3.00	9.90	26/ 77 T
LAW 5007	3.5	2.00	2.00	7.00	13/ 77 T
LAW 5009	3.4	3.00	3.00	10.20	17/ 77 T
LAW 5015	2.5	3.00	3.00	7.50	25/ 39
LAW 5021	3.0	2.00	2.00	6.00	
SEMESTER		13.00	16.00	40.60	3.12
SEC RNK 34/ 77 LSU SYSTEM		13.00	16.00	40.60	3.12
CLS RNK 91/232 TIE CUMULATIVE		13.00	16.00	40.60	3.12

LOUISIANA STATE UNIVERSITY
2ND SEM 2021-2022

DEPT CRSE	GR	CARR	EARN	QPTS	
LAW 5002	3.3	3.00	3.00	9.90	14/ 39 T
LAW 5006	2.9	3.00	3.00	8.70	41/ 76 T
LAW 5008	3.0	3.00	3.00	9.00	45/ 77 T
LAW 5010	3.5	3.00	3.00	10.50	7/ 76 T
LAW 5017	3.4	2.00	2.00	6.80	18/ 75 T
LAW 5022	2.9	2.00	2.00	5.80	
SEMESTER		16.00	16.00	50.70	3.16
SEC RNK 30/ 76 LSU SYSTEM		29.00	32.00	91.30	3.14
CLS RNK 78/227 TIE CUMULATIVE		29.00	32.00	91.30	3.14

LOUISIANA STATE UNIVERSITY
3RD SEM 2021-2022

DEPT CRSE	GR	CARR	EARN	QPTS	
LAW 5402	4.0	3.00	3.00	12.00	1/ 89 T
LAW 5605	3.0	3.00	3.00	9.00	26/ 48 T
LAW 5907	P		3.00		
SEMESTER		6.00	9.00	21.00	3.50
LSU SYSTEM		35.00	41.00	112.30	3.20
CLS RNK 73/224 CUMULATIVE		35.00	41.00	112.30	3.20

LOUISIANA STATE UNIVERSITY
1ST SEM 2022-2023

LAW 5206	3.2	3.00	3.00	9.60	
LAW 5424	3.7	3.00	3.00	11.10	4/ 35 T
LAW 5447	3.3	2.00	2.00	6.60	19/ 67 T
LAW 5530	3.0	3.00	3.00	9.00	28/ 55 T
LAW 5888	3.8	2.00	2.00	7.60	
LAW 6003	P		3.00		
SEMESTER		13.00	16.00	43.90	3.37
LSU SYSTEM		48.00	57.00	156.20	3.25
CLS RNK 66/216 CUMULATIVE		48.00	57.00	156.20	3.25

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2ND SEM 2022-2023

LAW 5311	IP	3.00
LAW 5417	IP	2.00
LAW 5461	IP	3.00
LAW 5721	IP	2.00
LAW 5775	IP	3.00

CURRENTLY ENROLLED 13.00

PENDING DEGREE PROGRAMS:

DEGREE SEQ NBR: 02
L MAJOR JDCL 2022 1S/2022

**********END OF ACADEMIC RECORD**********

***** NOTE THIS IS NOT AN OFFICIAL TRANSCRIPT *****

Official Transcript

Institution Info: James Madison University
South Main Street
Harrisonburg, VA 22807
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Name: Young,Evan Daniel
Student ID: 108540972
Address: 9505 Carterwood Road
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United States

Recipient: EVAN DANIEL YOUNG

Print Date: 07/15/2022

Degrees Awarded

Degree: Bachelor of Arts
Confer Date: 12/19/2015
Plan: Major in Modern Foreign Languages
Sub-Plan: Concentration in Italian

Academic Program

Program: Undergraduate
Modern Foreign Lang - BA Major
Italian Concentration

Beginning of Undergraduate Record

Fall Semester 2012

Transfer Credit from Virginia Community College System (II)
Applied Toward Undergraduate

Course		Description	Attempted	Earned	Grade	Points
GBIO	103	CONTEMPORARY BIOLOGY	0.00	3.00	CR	0.000
GECON	200	INTRO MACROECONOMICS	0.00	3.00	CR	0.000
GHIST	102	WORLD HISTORY SINCE 1500	0.00	3.00	CR	0.000
GPOSC	225	U.S. GOVERNMENT	0.00	3.00	CR	0.000
GSCI	101	PHYS, CHEM & HUMAN EXP	0.00	3.00	CR	0.000
GSCI	104	SCIENTIFIC PERSPECTIVES	0.00	1.00	CR	0.000
GSCI	104	SCIENTIFIC PERSPECTIVES	0.00	1.00	CR	0.000
GWRTC	103	CRITICAL READING AND WRITING	0.00	3.00	CR	0.000
MATH	220	ELEMENTARY STATISTICS	0.00	3.00	CR	0.000
WRTC	100	READING AND WRITING WORKSHOP	0.00	3.00	CR	0.000
Course Trans GPA:		0.000 Transfer Totals:	0.00	26.00		0.000

Course		Description	Attempted	Earned	Grade	Points
GCOM	123	FUND HUMAN COMM: GROUP PRES	3.00	3.00	B-	8.100
GPHIL	120	CRITICAL THINKING	3.00	3.00	D	3.000
ITAL	101	ELEMENTARY ITALIAN I	4.00	4.00	B+	13.200
MATH	103	NATURE OF MATHEMATICS	3.00	3.00	C	6.000
POSC	295	RESEARCH METHODS IN POSC	4.00	4.00	C+	9.200

			Attempted	Earned	Points
Term GPA	2.323	Term Totals	17.00	17.00	39.500
Cum GPA	2.323	Cum Totals	17.00	43.00	39.500

Academic Good Standing

Spring Semester 2013

Course		Description	Attempted	Earned	Grade	Points
COB	191	BUSINESS STATISTICS	3.00	3.00	C	6.000
COB	204	COMPUTER INFORMATION SYSTEMS	3.00	3.00	C	6.000
ECON	201	PRIN OF ECON (MICRO)	3.00	3.00	D	3.000
ITAL	102	ELEMENTARY ITALIAN II	4.00	4.00	A	16.000

			Attempted	Earned	Points
Term GPA	2.384	Term Totals	13.00	13.00	31.000
Cum GPA	2.350	Cum Totals	30.00	56.00	70.500

Academic Good Standing

Fall Semester 2013

Course		Description	Attempted	Earned	Grade	Points
COB	218	LEGAL ENVIR OF BUSINESS	3.00	3.00	B+	9.900
COB	241	FINANCIAL ACCOUNTING	3.00	3.00	C	6.000
GARTH	205	PREHIST TO RENAISSANCE	3.00	3.00	C	6.000
GISAT	151	TOPICS IN APPLIED CALC	4.00	4.00	D	4.000
ITAL	231	INTERMEDIATE ITALIAN I	3.00	3.00	A-	11.100

			Attempted	Earned	Points
Term GPA	2.312	Term Totals	16.00	16.00	37.000
Cum GPA	2.336	Cum Totals	46.00	72.00	107.500

Academic Good Standing

Spring Semester 2014

Course		Description	Attempted	Earned	Grade	Points
COB	202	INTERPERSONAL SKILLS	3.00	3.00	B+	9.900
COB	242	MANAGERIAL ACCOUNTING	3.00	3.00	D-	2.100
COB	291	INTRO TO MANAGEMENT SCI	3.00	3.00	D	3.000
ITAL	232	INTERMEDIATE ITALIAN II	3.00	3.00	B-	8.100

			Attempted	Earned	Points
Term GPA	1.925	Term Totals	12.00	12.00	23.100
Cum GPA	2.251	Cum Totals	58.00	84.00	130.600

Academic Good Standing

Fall Semester 2014

Course		Description	Attempted	Earned	Grade	Points
COB	204	COMPUTER INFORMATION SYSTEMS	3.00	3.00	B	9.000
Repeated:		Repeat Credit				
COB	242	MANAGERIAL ACCOUNTING	3.00	3.00	B	9.000
Repeated:		Repeat Forgiveness				
ECON	201	PRIN OF ECON (MICRO)	3.00	3.00	B	9.000
Repeated:		Repeat Forgiveness				
GENG	239	STUDIES IN WORLD LITERATURE	3.00	3.00	D	3.000
ITAL	300	GRAMMAR AND COMMUNICATION	3.00	3.00	B	9.000

			Attempted	Earned	Points
Term GPA	2.600	Term Totals	15.00	15.00	39.000
Cum GPA	2.455	Cum Totals	67.00	90.00	164.500

Academic Good Standing

Spring Semester 2015

Course		Description	Attempted	Earned	Grade	Points
ITAL	308	CONTEMPORARY ITAL CIVILIZATION	3.00	3.00	A-	11.100
ITAL	330	BUSINESS ITALIAN	3.00	3.00	A	12.000
ITAL	335	INTRO TO ITALIAN LITERATURE	3.00	3.00	A-	11.100
ITAL	465	ITALIAN CINEMA	3.00	3.00	A	12.000

			Attempted	Earned	Points
Term GPA	3.850	Term Totals	12.00	12.00	46.200
Cum GPA	2.667	Cum Totals	79.00	102.00	210.700

Term Honor: Dean's List
Academic Good Standing

Summer Session 2015

Transfer Credit from J SARGEANT REYNOLDS COMMUNITY COLLEGE, VA (II)
Applied Toward Undergraduate

Course		Description	Attempted	Earned	Grade	Points
HTH	100	PERSONAL WELLNESS	0.00	3.00	CR	0.000
PSYC	101	GENERAL PSYCHOLOGY	0.00	3.00	CR	0.000
Course Trans GPA:		0.000 Transfer Totals:	0.00	6.00		0.000

Course		Description	Attempted	Earned	Grade	Points
ITAL	375	BUSINESS & SOCIETY IN ITALY	3.00	3.00	B+	9.900
ITAL	446	SPECIAL TOPICS IN ITALIAN LIT	3.00	3.00	A	12.000
Topic:		INTRO TO ITALIAN POETRY PT I				

			Attempted	Earned	Points
Term GPA	3.650	Term Totals	6.00	6.00	21.900
Cum GPA	2.736	Cum Totals	85.00	114.00	232.600

Academic Good Standing

Fall Semester 2015

Transfer Credit from RADFORD UNIVERSITY, VA (IV)
Applied Toward Undergraduate

Course		Description	Attempted	Earned	Grade	Points
PHIL	101	INTRODUCTION TO PHILOSOPHY	0.00	3.00	CR	0.000
Course Trans GPA:		0.000 Transfer Totals:	0.00	3.00		0.000

Course		Description	Attempted	Earned	Grade	Points
ITAL	307	ITALIAN CIVILIZATION	3.00	3.00	C+	6.900
ITAL	320	ORAL AND WRITTEN COMMUNICATION	3.00	3.00	A-	11.100
ITAL	435	TRANSLATION STRATEGIES	3.00	3.00	B	9.000
ITAL	446	SPECIAL TOPICS IN ITALIAN LIT	3.00	3.00	A-	11.100
Topic:		INTRO TO ITALIAN POETRY PT II				
SPAN	232	INTERMEDIATE SPANISH II	3.00	3.00	A-	11.100

			Attempted	Earned	Points
Term GPA	3.280	Term Totals	15.00	15.00	49.200
Cum GPA	2.818	Cum Totals	100.00	132.00	281.800

Academic Good Standing

Undergraduate Career Totals

			Attempted	Earned	Points
Cum GPA	2.818	Cum Totals	100.00	132.00	281.800

Non-Course Milestones

General Education Competency R
Status: Completed
Milestone Level: ISST Standard
Milestone Title: Gened ISST

End of Official Transcript

Much to the Wh to
James Madison University
Registrar

LSU Law

Faculty

June 23, 2023

Judge Jamar K. Walker
Eastern District of Virginia
600 Granby Street
Norfolk, VA 23510

Dear Judge Walker,

I write to recommend my student, Evan Young, for a clerkship with you. Evan is a second year law student at LSU and I have had the pleasure of teaching him two classes: Maritime Torts, last fall, and Constitutional Law 14th Amendment, this semester. I have also had the opportunity to talk to him a great deal outside the classroom and judge a practice round of the LSU Admiralty Moot Court Team of which he is a member. Evan will be an outstanding clerk and a fantastic lawyer.

In Maritime Torts, Evan was always prepared, asked fantastic questions, and always showed that he had thought carefully about the material. The class was one of the most accomplished I have ever had; it was loaded with high achievers who have done very well in law school. Evan was more than up to the task and he did extremely well, receiving a 3.7 (out of 4.0), one of the highest grades in the class.

This Spring in Constitutional Law 14th Amendment he is once again proving himself a fine student and a great person to have in class. Even is once again totally prepared and absorbed in the material. He asks probing questions that manifest his careful considerations of what we are covering.

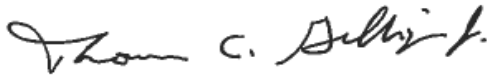
As the Admiralty Moot Court team prepared for their competition, Evan frequently asked me about questions he was being asked in practice and potential responses. The issue involved marine insurance and my conversations with him about the obligation of utmost good faith in maritime insurance contracts taught me a lot more than I was able to teach him. When I judged their final practice round before the competition I was incredibly impressed by Evan's performance. He was conversational and respectful; he was professional and persuasive; he was, in short, skilled beyond his years. In the competition his team made it to the national quarterfinals and he received a perfect score on one of his rounds.

Personally, Evan is thoughtful, likeable, and friendly. LSU has an LL.M. program designed for foreign lawyers; it is a program which enriches our community. And Evan should be the ambassador of the program. I had two LL.M. students from Africa in my maritime Torts class and Evan made sure I met them both, that they had appropriate materials, and secondary sources. During their first days at LSU Law, he guided them and welcomed them. I remain most impressed.

In addition, to all this, Evan is the President of our student International Law Society, reached our internal Tullis Moot Court semifinals, is the Assistant Editor of the Journal for Civil Law Studies, and won a CALI Award in International Law. He has had field placements in the Louisiana First Court of Appeal and the U.S. District Court for the Middle District.

In conclusion, I think the world of Evan Young and I recommend him wholeheartedly.

Sincerely,



Thomas C. Galligan, Jr.
Dodson & Hooks Endowed Chair in Maritime Law, LSU Law Center
James Huntington and Patricia Kleinpeter Odom Professor of Law, LSU Law Center
LSU President Emeritus

TCG:pah

June 19, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am a maritime defense attorney and equity partner at NeunerPate in Lafayette, LA. It has been a privilege to coach Evan Young through LSU Law in the John R. Brown Admiralty Moot Court Competition. I have enjoyed getting to know Evan both professionally and personally. I look forward to coaching him again this year as the team travels to compete in Seattle during his third year of law school.

Evan is destined to be a great litigator. He understands the importance of extensive preparation, which is reflected in the quality of his oral advocacy and measured demeanor. His research and writing skills also showcase his attention to detail. I believe that he will be an excellent law clerk. Because he is a bit older than the average law student, he is also much more mature than most applicants for this position. I think that he will be a great asset to your judicial staff.

If you have any questions or wish to discuss my experience with Evan, please do not hesitate to contact me.

PHILLIP M. SMITH
ATTORNEY

NeunerPate
P: 337 237 7000 D: 337 272 0392
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One Petroleum Center
1001 West Pinhook Road, Suite 200
Lafayette, LA 70503

QUESTIONS PRESENTED

Whether the longstanding federal maritime duty under Uberrimae Fidei is an entrenched part of federal maritime law, invoking an application of federal law?

Statement of the Case

Emily Morgan (Ms. Morgan) had an insurance policy on her yacht, the San Jacinto. On November 8, 2016, Ms. Morgan was operating her yacht, the San Jacinto, in Galveston Bay when she allided with a pier. (R. 13a). The allision caused minor damage to her yacht. *Id.* Yellow Rose Insurance Co., Inc (Yellow Rose) paid for the damages (minus the policy deductible). *Id.* Ms. Morgan purchased another yacht called the Channel Point. *Id.* Yellow Rose offered Ms. Morgan favorable terms based on their amicable business relationship with her. (R. 14a).

On May 5, 2018, Ms. Morgan formally filled out her application for marine insurance offered by Yellow Rose. *Id.* When filling out the company's standard form insurance application, Ms. Morgan concedes she made a material omission by failing to list the allision involving the San Jacinto when answering the application's question about any previous losses involving a vessel owned by Morgan. (R. 15a).

While hosting a New Year's party for friends on the San Jacinto in Galveston on January 4, 2019, a fire broke out at the Kemah marina damaging the Channel Point. It was declared a total loss. (R. 14a). Morgan filed a claim with Yellow Rose. *Id.* On March 18, 2019,

Yellow Rose declined to pay for the loss and sued Ms. Morgan, arguing that it was entitled to avoid the policy due to Ms. Morgan's material omission and returned the premium. *Id.* On April 16, 2019, Ms. Morgan filed a counterclaim for breach of contract. *Id.*

At trial, the district court for the Southern District of Texas found that under fifth circuit precedent in *Albany Ins. Co. v. Anh Thi Kieu*, 927 F.2d 882 (5th Cir. 1991), the doctrine of Uberrimae Fidei is not entrenched in general maritime law and under the Supreme Court's decision in *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310, 75 S. Ct. 368, 99 L. Ed. 337 (1955), Texas state law should apply. (R. 15a). The Texas supreme court recognized the reliance requirement in marine insurance claims in *Mayes v. Massachusetts Mut. Life Ins. Co.*, 608 S.W.2d 612 (Tex. 1980). (R. 16a). The District Court said that because Yellow Rose conceded that it was unable to prove that it relied on Ms. Morgan's failure to report the San Jacinto allision when it agreed to issue the policy, Yellow Rose had no right to avoid the policy and thus breached its contract with Ms. Morgan. *Id.* Yellow Rose appealed. (R. 1b)

On appeal, the Fifth Circuit overturned *Anh Thi Kieu* and said that Uberrimae Fidei is entrenched in federal maritime law and, thus, federal law should apply. (R. 1a). The Court also held that Uberrimae Fidei did not require Yellow Rose to rely on the omission to void the policy. (R. 6a). The Fifth Circuit reversed the district court. *Id.* Ms. Morgan appealed, and the Supreme Court granted certiorari. (R. 1b).

Argument

Federal law applies to the issue between Yellow Rose Insurance and Emily Morgan.

I. Congress has not precluded federal law from governing marine insurance.

The petitioner cites the McCarran- Ferguson Act (15 U.S.C. § 1011) (the Act) as a federal precedent precluding the federal courts from making maritime law that governs marine insurance. But it is a misreading of the Act. Congress said that federal law shall not apply to the business of insurance *unless* Congress explicitly said so. *Id.* Congress passed The Act to protect the business of insurance from anti-trust investigations after this Court in *United States v. S.-E. Underwriters Ass'n,* 322 U.S. 533,553, 64 S. Ct. 1162, 88 L. Ed. 1440 (1944) found that insurance companies that did business across state lines were engaged in interstate commerce and thus subject to federal law. However, Congress passed the Act intending to exclude insurance companies from specific federal statutes. Therefore, the purpose of the Act is to act as a cut-out, not a directive.

In the second section of the Act, Congress explicitly said that state law should govern the insurance business. 15 USC § 1012(a). However, subsections (a) and (b) need to be read in tandem, where Congress explicitly laid out the federal statutes that would not apply to the business of insurance. 15 USC § 1012(b). Therefore § 1012 resets the regulation of insurance to the pre- *S.-E. Underwriters Ass'n* status quo. Since no federal statute applies, State law governs the business of insurance. The Act did not say that federal Courts could not make a law regulating marine insurance.

This Court in *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310, 75 S. Ct. 368, 99 L. Ed. 337 (1955) construed the scope of the Act and specifically held that the McCarran-

Ferguson Act is inapplicable to marine insurance policies. "Congress has not taken over the regulation of marine insurance contracts and has not dealt with the effect of marine insurance warranties at all; hence there is no possible question here of conflict between state law and any federal statute." *Id* at 314

The *Wilburn Boat* Court went on to say that since there was no act of Congress, the Supreme Court sitting in admiralty was free to make new rules governing marine insurance. As "States can no more override such judicial rules validly fashioned than they can override Acts of Congress." *Id.* at 348.

That interpretation is supported by Thomas Schoenbaum and the 9th circuit in *Certain Underwriters at Lloyds, London v. Inlet Fisheries Inc*., 518 F.3d 645, 649–50 (9th Cir. 2008). When that Court said, "*Wilburn Boat* does not change the initial inquiry of the courts in interpreting a policy of marine insurance to determine whether there is an established federal maritime law rule." Thomas J. Schoenbaum, *Admiralty and Maritime law* § 17–6; *Inlet Fisheries Inc*. at 649. Courts still follow the *Jensen* analysis. Courts will still look to see if there is an act of Congress. Is there a federally established maritime law? If not, is there a need for a uniform rule? *S. Pac. Co. v. Jensen*, 244 U.S. 205, 37 S. Ct. 524, 61 L. Ed. 1086 (1917).

Because Congress has yet to speak on the issue of marine insurance regulation, this Court can fill the gap as it has done before. See *Moragne v. States Marine Lines, Inc*., 398 U.S. 375, 90 S. Ct. 1772, 26 L. Ed. 2d 339 (1970); *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 128 S. Ct. 2605, 171 L. Ed. 2d 570 (2008); *E. River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 106 S. Ct. 2295, 90 L. Ed. 2d 865 (1986); *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 66 S. Ct. 872, 90 L. Ed. 1099 (1946).

II. Uberrimae Fidei is an entrenched federal precedent.

As noted above, the Court in *Wilburn Boat* went through an established process of determining if they should make an admiralty rule. Finding no applicable act of Congress, the Court examined the circuit courts and various state laws to determine if the strict adherence to warranties was an established federal precedent. *Wilburn Boat Co.*, 348 U.S. 310. While the Court ultimately found that there was no need to make a federal maritime rule because only two circuits had found that strict adherence to warranties as a part of maritime law, and there was little state law addressing the matter. The doctrine of Uberrimae Fidei has far more authority to back it.

First, Uberrimae Fidei has a long history in American law. In the 1828 case of *McLanahan v. Universal Ins. Co.*, 26 U.S. 170, 7 L. Ed. 98 (1828), Justice Story is credited with importing Uberrimae Fidei from English common law when he said that an insurance contract was "a contract Uberrimae Fidei." *Id.* at 185. A Hundred years later, this Court again applied Uberrimae Fidei in *Stipcich v. Metro. Life Ins. Co.*, 277 U.S. 311, 48 S. Ct. 512, 72 L. Ed. 895 (1928). This Court declared that Uberrimae Fidei was an entrenched part of insurance law. *Id.* Even though this was a pre-*Erie* case applying federal general insurance law, the doctrine still applied to insurance under federal law. Because marine insurance contracts fall under maritime law, which is federal law, Uberrimae Fidei governs marine insurance. Thus, Uberrimae Fidei is a part of general admiralty law.

Second, the First, Second, Third, Eighth, Ninth, Eleventh and now the Fifth[1] circuits all found that Uberrimae Fidei is an established federal precedent. The circuit courts take different approaches to determine if a doctrine is an "established federal precedent." The Ninth Circuit

[1] Note: the fictional Fifth circuit in the moot court problem overturned *Anh Thi Kieu* and said that Uberrimae Fidei was "entrenched."

requires that a "rule be sufficiently longstanding and accepted within admiralty law that it can be said to be 'established.'" *Inlet Fisheries*, 518 F.3d at 650. The Fifth Circuit previously required the admiralty rule to be "entrenched federal precedent." *Albany Ins. Co. v. Anh Thi Kieu*, 927 F.2d 882, 888 (5th Cir.1991). Meanwhile, the Second Circuit looks to whether the rule is "well established," *Puritan Ins. Co. v. Eagle S.S. Co. S.A.*, 779 F.2d 866, 870 (2d Cir.1985), and the Eleventh Circuit determines whether the rule is "well settled," *Steelmet, Inc. v. Caribe Towing Corp.*, 747 F.2d 689, 695 (11th Cir. 1984). While these Circuits differ somewhat in their precise language, the idea behind the analysis is consistent. *A.G.F. Marine Aviation & Transp. v. Cassin*, 544 F.3d 255, 262 (3d Cir. 2008).

Lastly, while most states do not follow Uberrimae Fidei, California, New York, and Florida, three of the biggest states in maritime commerce, have codified the doctrine. See *Certain Underwriters at Lloyd's v. Montford*, No. CV 92-233 LGB, 1993 WL 590136 (C.D. Cal. July 12, 1993) (under California law, a yacht policy is void from inception due to misrepresentation of the year of construction and purchase price); *Royal Ins. Co. of Am. V. H.A. Fleming*, 1986 A.M.C. 2077(M.D. Fla. 1985); *Albany Ins. Co. v. Wisniewski*, 579 F. Supp. 1004 (D.R.I. 1984). The consensus amongst the circuits should lend substantial weight to the finding that Uberrimae Fidei is an established federal precedent. However, the need for a uniform maritime rule for Uberrimae Fidei should also weigh in favor of its recognition by this Court.

III. Uberrimae Fidei needs a uniform rule to promote better maritime commerce and a more efficient marine insurance market.

Uniformity would help facilitate maritime commerce because it would limit disruptions in vessel operations. Commercial vessels undergo inspections yearly to maintain certification by the Coast Guard. 46 C.F.R. § 2.01-5. Therefore, vessel owners already have detailed information about their vessels. It is logical and economical to allow insurance companies to rely on that information. Similarly, requiring insurance companies to verify the same data would require another ship inspection. That ship may not be in a neighboring port but is sometimes on the other side of the world.

Insurance company verification creates two inefficiencies. First, the inspection itself would be expensive. It would require the insurance company to send an inspector to another country or hire a local inspector to verify information that the Coast Guard already has. The higher costs on the insurance company ultimately reverberate back to the assured in the form of higher premiums. Second, the inspector would need time to reinspect the vessel. That means the vessel would be docked, unable to participate in maritime commerce merely to have the same information reviewed. Taking the vessel out of maritime commerce reduces its profitability. Thus, the vessel owners suffer the dual punishment of having to pay higher insurance premiums and a reduction in the profitability of their vessels.

Uberrimae Fidei helps to create a more efficient marine insurance market by reducing moral hazard and adverse selection. It reduces adverse selection because it helps aggregate uncorrelated losses in two ways: first, the accuracy and prediction of the risk generated by everyone holding an independent and identically valued risk will improve as the number of those individuals increases. Second, the ability to predict and reduce the practical risk level will also improve as the number of statistically independent risks grows. Therefore, aggregation of risks is critical to risk reduction efforts in the insurance market. Elizabeth Germano, *A Law and*

Economics Analysis of the Duty of Utmost Good Faith (Uberrimae Fidei) in Marine Insurance Law for Protection and Indemnity Clubs, 47 St. Mary's L.J. 727, 781 (2016) (Germano).

Risk aggregation allows insurance companies to separate the assured into the proper risk pools. Segregation can reduce statistical risk variance below that of a more broadly aggregated pool by separating the high-risk insured from the low-risk insured. This reduction in statistical variance reduces the overall pool risk level, improves predictive accuracy under the law of large numbers, and, as a result, reduces aggregate insurance premiums. By setting an insurance premium that most accurately reflects the insured's risk, risk segregation can reduce the underlying level of losses. This helps the insured internalize the cost of their risky behavior because they can decide how much to engage in based on the insurance cost. As a result, the insurance company can charge the low-risk insured lower premiums than the high-risk insured. *Id.* at 782.

There are sound economic reasons to use Uberrimae Fidei. "Parties to contracts need to know the risks they are facing to create a contract that maximizes mutual value to them." Knowing the material facts is essential to place the insured into the appropriate risk pool. Misrepresentation defeats the insurer's efforts to segregate risks and increase insurance availability. Finally, this rule is "cost effective in terms of maximizing the possibilities of insurance" because "the potential policyholder is in the best position to know" the relevant material facts. *Id.* at 786.

Finally, a uniform rule for Uberrimae Fidei would create predictability where there is currently none. This case before the Court started because the two parties could not decide how Uberrimae Fidei applies to their contract. Uncertainty means litigation, and that means higher

legal fees. Consumers ultimately pay higher legal fees in the form of higher premiums. A uniform rule would reduce legal and premium costs for the assured.

Conclusion

Uberrimae Fidei ultimately ensures low premiums for the assured because it encourages an efficient marine insurance marketplace and allows commercial vessels to engage in more maritime commerce. If this Court finds that Uberrimae Fidei is not an established federal precedent, this Court would be punishing a large class of prudent consumers of marine insurance all because of one admittedly sympathetic plaintiff. Any rule this Court makes today will affect not only recreational vessels but commercial vessels as well. This Court should affirm the 5th circuit's ruling and formally recognize what all the other circuits have, that Uberrimae Fidei is an established federal precedent.

Applicant Details

First Name	**Jason**
Last Name	**Zheng**
Citizenship Status	**U. S. Citizen**
Email Address	**jason.zheng@live.law.cuny.edu**
Address	**Address** **Street** **265 Cherry St APT 2H** **City** **New York** **State/Territory** **New York** **Zip** **10002** **Country** **United States**
Contact Phone Number	**9179002365**

Applicant Education

BA/BS From	**City University of New York-John Jay College of Criminal Justice**
Date of BA/BS	**December 2018**
JD/LLB From	**City University of New York School of Law** **http://www.law.cuny.edu**
Date of JD/LLB	**May 16, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**CUNY Law Review**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Zalesne, Deborah
Zalesne@law.cuny.edu
_718_ 340-4328
Lung, Shirley
shirley.lung@law.cuny.edu
Rossein, Rick
rossein@law.cuny.edu
Parkin, Jason
jason.parkin@law.cuny.edu

This applicant has certified that all data entered in this profile and any application documents are true and correct.

June 11, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am a rising third-year law student at the City University of New York (CUNY) School of Law, and I am writing to apply for the clerkship opening in your chambers for August 2024. Having grown up in a low-income immigrant neighborhood, I understand the value of community and public service. Enclosed with my application is evidence of my commitment to public service throughout my career. Working in Maryland this summer, I realized that a federal clerkship in the Mid-Atlantic would be an excellent and fulfilling way to continue my career in public service.

In law school, I have focused my energy on gaining as much experience in courtrooms as I can. My judicial internships at the Second Circuit U.S. Court of Appeals and the New York State Supreme Court have exposed me to a law clerk's work. As a judicial intern, I have been responsible for digesting case facts, researching novel areas of the law, and writing concise and precise memos for judges. This experience has helped me to analyze issues from multiple perspectives, allowing me to approach cases objectively and effectively. I also now understand the need to balance meeting deadlines while maintaining clarity, concision, and accuracy. This summer, I plan to continue improving these legal research and writing skills as a Summer Associate at a Baltimore civil rights law firm.

Please find my resume, writing sample, and transcripts enclosed. My letters of recommendation will be sent separately from my recommenders. They are:

Shirley Lung
Professor of Law
Lung@law.cuny.edu
718-340-4322

Jason Parkin
Co-Director, Economic Justice Project & Professor of Law
Jason.parkin@law.cuny.edu
718-340-4621

Merrick T. Rossein
Professor of Law
Rossein@law.cuny.edu
718-340-4316

Deborah Zalesne
Professor of Law
Zalesne@law.cuny.edu
646-637-3708

Thank you for your consideration, and I hope to have the opportunity to interview with you.

Respectfully,
Jason J. Zheng

JASON J. ZHENG (He/Him)

265 Cherry Street, Apt. 2H, New York, NY 10002 | (917) 900-2365 | Jason.Zheng@live.law.cuny.edu

EDUCATION

CITY UNIVERSITY OF NEW YORK SCHOOL OF LAW
J.D. Candidate, May 2024; GPA: 3.8; Pipeline to Justice Alumni; Trial Practice Student: see videos.
Leadership Activities: Vice President, Asian Pacific American Law Student Association; Senior Staff Editor, Law Review; Vice President, American Constitution Society; Teaching Assistant for Professor Deborah Zalesne's 1L Contracts Class.

JOHN JAY COLLEGE OF CRIMINAL JUSTICE (City University of New York)
B.S. Criminal Justice, December 2018; Minor in Theater Arts.

EXPERIENCE

CREATING LAW ENFORCEMENT ACCOUNTABILITY & RESPONSIBILITY (CLEAR) CLINIC, CUNY SCHOOL OF LAW, Long Island City, NY, Fall 2023
Prospective Student Attorney: Provide pro bono legal representation in support of partner communities and movements. Represent and advise clients concerning government policies and practices related to national security, counterterrorism, and Chinese espionage.

BROWN, GOLDSTEIN & LEVY, Baltimore, MD, Summer 2023
Summer Associate: Assist in cases on behalf of exonerees in state and federal wrongful conviction proceedings, including researching and drafting petitions for compensation and written discovery requests. Support ongoing litigation in federal civil rights matters, including employment, immigration, fair housing, trans, and disability rights.

JUDGE MYRNA PÉREZ, U.S. COURT OF APPEALS, SECOND CIRCUIT, New York, NY, Spring 2023
Judicial Extern: Reviewed immigration removal proceeding petitions and wrote bench memos analyzing whether to grant, deny, or move petitions to the regular argument calendar. Researched relevant case law, statutes, and the appropriate standard of review. Reviewed new Second Circuit opinions and wrote bench memos on whether Judge should call for *en banc* review. Proofread, blue booked, and cited checked opinions and summary orders. Observed oral arguments and participated in post-argument roundtable chamber conferences.

MANHATTAN DISTRICT ATTORNEY'S OFFICE, RACKETS BUREAU, New York, NY, Fall 2022
Legal Intern: Assisted with investigations on white-collar matters involving wage theft, financial and tax fraud schemes, and illicit money movements, including cryptocurrency money laundering and wire fraud. Researched and wrote memos analyzing the legality and admissibility of evidence and statements. Observed criminal court proceedings and conferences. Cabined and reviewed discovery materials. Ensured that exculpatory and impeachable evidence was given to defense counsel consistent with statutory and Constitutional requirements. Helped prepare for *Mapp*, *Huntley*, and *Dunaway* hearings.

JUSTICE PINEDA-KIRWAN, NEW YORK STATE SUPREME COURT, Mineola, NY, Summer 2022
Judicial Intern: Worked on property and employment cases. Digested case files, researched relevant law, and wrote bench memos analyzing whether to grant or deny a motion. Worked on summary judgment, motion to dismiss, and order to show cause motions. Observed preliminary, compliance, certification, settlement, and motion conferences. Observed bench trials.

JING FONG RESTAURANT, New York, NY, 2017 – 2020
Manager: Managed over 100 employees. Developed and executed strategic plans to increase profit margins.

TWO BRIDGES COMMUNITY COUNCIL, New York, NY, 2014 – Present
Representative & Community Organizer: Represent the Two-Bridges Chinese community. Speak on their behalf about community concerns and needs. Translate vital Section-8 housing information to 70 Chinese tenants. Organize community events such as the Lunar New Year celebrations, Hurricane Sandy food and shelter relief, and summer night youth basketball tournaments. Facilitated food pantry for the community during the Covid-19 pandemic.

PERSONAL

Proficient Cantonese speaker; Chinese lion dancer; weightlifter; history buff.

Law Student Copy Academic Record

Name: Jason Zheng
Student ID: 16074881

Birthdate: 06/10
Student Address: 265 Cherry Street Apt 2H
New York, NY 10002-7933
Print Date: 06/06/2023

Other Institutions Attended:

Academic Program History

Program: Law
06/09/2021: Active in Program
06/09/2021: Law JD Major

---------- **Beginning of Law Record** ----------

2021 Fall Term

Course	Description	Earn	Grd
LAW 701	Contract Law Market Economy I	3.00	CR
Contact Hours:	3.00		
LAW 705	Legal Research	2.00	CR
Contact Hours:	2.00		
Course Attributes:	ZERO Textbook Cost		
LAW 7004	Lawyering Seminar I	4.00	CR
Contact Hours:	4.00		
LAW 7043	Liberty Equality & Due Process	3.00	CR
Contact Hours:	3.00		
LAW 7131	Crim L-Rsp Inj Condu	3.00	CR
Contact Hours:	3.00		

2022 Spring Term

Course	Description	Earn	Grd
LAW 702	Contracts: LME II	3.00	A-
Contact Hours:	3.00		
LAW 709	Civil Procedure	3.00	A
Contact Hours:	3.00		
LAW 7005	Lawyering Seminar II	4.00	A-
Contact Hours:	4.00		
LAW 7141	Torts-Rsp Inj Conduc	3.00	A
Contact Hours:	3.00		
LAW 7161	Law and Family Relations	2.00	A-
Contact Hours:	2.00		

Academic Standing Effective 06/28/2022: Good Academic Standing

2022 Summer Term

Course	Description	Earn	Grd
LAW 780	Criminal Procedure: Investigat	3.00	A-
Contact Hours:	3.00		

2022 Fall Term

Course	Description	Earn	Grd
LAW 811	Criminal Procedure:Adjudica	3.00	A
Contact Hours:	3.00		
Course Attributes:	Low Textbook Cost		
LAW 7192	Constitutional Structures	3.00	A
Contact Hours:	3.00		
LAW 7251	Public Institutions/Admin Law	3.00	A-
Contact Hours:	3.00		
LAW 7261	Federal Courts	3.00	A-
Contact Hours:	3.00		
LAW 7723	Teaching Assistant	2.00	A
Contact Hours:	3.00		

Academic Standing Effective 01/18/2023: Good Academic Standing

2023 Spring Term

Course	Description	Earn	Grd
LAW 804	Law Review Editing	1.00	CR
Contact Hours:	3.00		
LAW 825	Lawyering Seminar III	4.00	A
Course Topic:	TRIAL PRACTICE		
Contact Hours:	4.00		
LAW 7151	Property: Law & Market Eco III	4.00	A
Contact Hours:	4.00		
LAW 7292	Evidence-L&Pub Int 1	4.00	B+
Contact Hours:	4.00		
LAW 7723	Teaching Assistant	2.00	A
Contact Hours:	3.00		

2023 Fall Term

Course	Description	Earn	Grd
LAW 861	CLEAR Clinic		
Contact Hours:	12.00		
LAW 7726	Topics In Law		
Course Topic:	Approaches to Discrimination		
Contact Hours:	3.00		

End of Law Student Copy Academic Record

June 2, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am pleased to write a letter recommending Jason Zheng for a federal clerkship. Mr. Zheng was a student in my year-long Contracts class his first year and was then my teaching assistant the following year. From our many interactions, I find him to be an a highly motivated student who demonstrates a strong commitment to the public interest.

In Contracts, Mr. Zheng was able to distinguish himself right away. He is a serious student with exceptional legal reasoning and writing skills. He reads cases with attention to detail and uses them effectively to make persuasive legal arguments. These skills earned him close to the top grade in Contracts, a large lecture class. Mr. Zheng is exceptionally smart, passionate about CUNY Law's public service values, and eager to implement them in his work. I would easily rank him as among the top five percent of students I have taught over the past twenty odd years.

Not only is his writing exceptional, but Mr. Zheng was also a frequent class participant in Contracts, consistently elevating the level of class discussions. His diverse experiences before and during law school reflected positively on his ability to analyze fact patterns. He regularly brought to bear in classroom dialogue his perspective as a leader, mentor, and advocate in his Asian immigrant community in New York. From this vantage, he effectively challenged assumptions and provided texture and depth to discussions about the impact of sexism, racism, and other inequalities on bargaining. In discussions with him both in and out of the classroom, he showed an impressive ability to step outside the confines of doctrine to understand how aspects of the law would likely have real effects on the conduct of individuals. He has a depth of interest and understanding that is a strong indicator of real talent for law.

Based on Mr. Zheng's maturity and understanding of the law, as well as the respect he commands from his peers, I sought him out to be a teaching assistant for my Contracts class this past year. In this capacity
he tutored individual students, provided feedback on writing assignments, and conducted review sessions for the entire class. Needless to say, Mr. Zheng's work was exceptional. The students found him approachable and knowledgeable about contract law, and I found his assistance invaluable.

In addition to academics, Mr. Zheng has also been very engaged in the law school community, where he is highly regarded among his peers for his passion, vision, and unique voice, and where I have witnessed his strong leadership skills and deep concern for others.

Overall, I am certain Mr. Zheng will be a dynamic legal scholar and effective advocate. I am confident he will continue to distinguish himself in whatever endeavors he undertakes and I recommend him without hesitation. If you would like additional information, please feel free to call me at 646.637.3708.

Sincerely,

Deborah Zalesne
Professor of Law

Deborah Zalesne - Zalesne@law.cuny.edu - _718_ 340-4328

June 12, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I write to strongly recommend Jason Zheng for a federal clerkship. Mr. Zheng has a strong academic record matched by both work and personal experiences that show a passionate commitment to civil rights litigation across a broad spectrum of areas. He has a compelling sense of personal, community, and professional purpose. Mr. Zheng has strong legal analytical, research, writing, and advocacy skills, as well as a superior ability to work with others. I have no doubt that he will bring intelligence, resourcefulness, and precision to his work as a law clerk.

Mr. Zheng was a student in my Torts class in Spring 2022. The Torts course integrates doctrine and theory with practice skills, and addresses the impact of race, gender, class, and immigration status on limiting the remedies available to someone when they are harmed by state or private behavior. As demonstrated throughout the semester, Mr. Zheng's legal analytical and writing skills are very strong. He tackles difficult legal issues and assignments, and analyzes problems, with clarity, precision, and thoroughness. Mr. Zheng demonstrated an excellent ability to master doctrine, and a fluid ability to use relevant law and facts. He cogently and diligently analyzes facts from many perspectives, and exercises excellent judgment in generating alternative positions. Other students often commented that the hypotheticals that Mr. Zheng posed to clarify doctrine were immensely helpful in their gaining a more nuanced understanding of tort rules.

Beyond strong analytic skills, I was most impressed by Mr. Zheng's constant desire to connect up all of what he was learning in his first-year courses to understand the tools and strategies that a civil rights attorney has at their disposal for representing marginalized communities. Mr. Zheng's questions sought to integrate doctrinal substance with procedural rules, and theory with nuts and bolts practice. I could tell even at that early point of his law school career that he was focused on developing the skills and habits needed by a successful practicing attorney who masters substance, procedure, and practicalities. I also appreciated Mr. Zheng's critical engagement with systemic structures that shape tort law and policies. His comments underlined the need for reform to make these systems, as well as government, more responsive to the needs of marginalized communities.

Mr. Zheng has a passionate commitment to litigation, advocacy, and reform to hold "systems" and government accountable to communities that are exploited, whether by private parties or governmental actors. From our conversations, he speaks powerfully about the importance of constitutionalism. As a child raised by immigrant parents in New York City's Chinatown, he has borne witness to how new immigrants have been impacted by exploitation as well as adverse governmental practices. I have no doubt that Mr. Zheng will become an intelligent and staunch advocate. He has a strong sense of his own path as a lawyer safeguarding civil and human rights.

Mr. Zheng has shown that he can function at a high level in mastering new subject matter, and integrating himself into the professional norms and expectations of diverse legal environments. It is evident from his resume that Mr. Zheng has worked assiduously to hone his legal analytical, research, and writing skills, as well as subject matter exposure, across a wide range of issues. These include national security and counterterrorism, wrongful convictions, immigration removal proceedings, white collar crimes (wage theft, tax fraud, money laundering), and employment law. Further, he has worked in different types of legal environments, including law school clinic, judicial clerkship, small firm practice, and government law office.

I am equally confident that Mr. Zheng will bring a strong sense of professionalism and great respect toward everyone that he will interact with in the legal system. It has been a privilege to work with Mr. Zheng. He is hard-working, refreshingly inquisitive, humble, collaborative, creative, and engaged. He carries a strong sense of fellowship and community in how he implements his work.

I highly recommend Mr. Zheng for a federal clerkship. If you have questions, please do not hesitate to contact me.

Sincerely,

Shirley Lung
Professor of Law
CUNY School of Law

The City University of New York

CUNY SCHOOL OF LAW

Law in the Service of Human Needs

Prof. Merrick Rossein
Professor of Law
Rick.rossein@law.cuny.edu

(718) 340-4316 Tel
(718) 340-4394 Fax

2 Court Square
Long Island City, NY 11101-4356

June 11, 2023

Dear Judge:

I enthusiastically recommend Mr. Jason Zheng for a Clerkship. I am confident that Mr. Zheng will be an excellent Clerk and attorney. His analytic, writing, research, and speaking abilities are excellent.

Mr. Zheng was in my Trial Practice Seminar in the spring 2023 semester. I asked him to serve as a Teaching Assistant (TA) in the spring 2024 semester, a position reserved for the best students. He consistently demonstrated excellent work in the Trial Practice class. He was one of the best among a very strong group of students.

The Trial Practice Seminar involved the students in learning and role playing trial preparation. Each student conducted pretrial depositions, argued a motion *in limine*, practiced direct and cross examination, opening, and closing arguments. He was critiqued by outstanding guest trial lawyers. He participated in a full in-person trial before a mock jury. His trial performance was excellent. The trial, including the pre-trial conference with the Judge where he argued a motion in limine, lasted over five hours. His direct was well developed and performed. His closing argument was powerful, locking eyes with the jurors and speaking directly to them without notes. Each student also produced a number of memoranda of law, a pre-trial memorandum, and a trial notebook. Although the seminar is four credits, the students actually put in more than four credits worth of work. It is a very demanding class. Mr. Zheng was a strong student who was consistently and thoroughly prepared to engage in high-level work.

Mr. Zheng is very bright with a keen intellect. He demonstrates excellent analytical and clinical judgment skills. His writing is clear and concise. His oral skills are excellent. He maintains a calm demeanor while persuasively arguing legal and factual points with strength. He learned well the critical importance of facts in litigation.

He worked very hard preparing all his in-role assignments and performed excellently. He was particularly good at critiquing his colleague's work. His classmates very well respected him. Mr. Zheng is also deeply reflective and insightful about his work and developing lawyering skills. He examined each piece of work after completion to learn from both his strengths and the areas with which he identified as needing more attention. He was also an adept collaborator with his "co-counsel" with whom he worked diligently. He is both a strong learner and teacher.

To place my reference in context, in addition to being on the faculty for over thirty-six years and the former Acting Dean, I continue to practice law and am currently serving as a litigation consultant to the U.S. Department of Justice, Civil Rights Division assisting in a sexual harassment case in Maryland. In 2021 I served the Civil Rights Division as an expert assisting in implementing a consent decree in a sexual harassment case in Florida. I served as the Independent Investigation Counsel for the NYS Assembly Standing Committee on Ethics and Guidance responsible for investigating claims of harassment, discrimination, and/or retaliation against assembly members.

I was a civil rights trial lawyer for many years. I litigated numerous race, sex, age, and disability discrimination cases, including the landmark sexual harassment case of *EEOC v. Sage Realty Corporation,* in which I prevailed for my client after trial. In another case, *Leibovitz v. New York City Transit Authority*, the recently passed U.S. District Court Judge Jack B. Weinstein in the attorneys' fees decision wrote: "Counsel [Rossein] ...is an extraordinarily able attorney specializing in discrimination litigation. *** Counsel was dealing with a difficult area in this field. He showed extraordinary skill [at trial]." *See,* 1999 WL 167688 E.D.N.Y. February 25, 1999.

I was selected and served for three years as the Independent EEO Consultant based on a U.S. District Court decision and remedial order in *U.S. and the Vulcan Society v. the City of New York.* After the court found that the New York City Fire Department's hiring practices discriminated based on race and ordered major reforms, the court mandated that a consultant develop compliance reform.

Mr. Zheng, in addition to being an outstanding student committed to public service law, is also a wonderful person with whom to work. He is an interesting and involved person. He is very inquisitive and is always seeking to learn and become an outstanding social justice lawyer. I am confident that he will do excellent work and promises to be an outstanding Clerk and lawyer. I have no doubt that he will be a valued asset to you. Please let me know if you need additional information.

Sincerely,

Merrick T. Rossein

Merrick T. Rossein
Professor of Law

June 12, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

It is my pleasure to recommend Jason Zheng, a member of the City University of New York School of Law's class of 2024, for a clerkship in your chambers. I am a Professor of Law at CUNY, and I have known Jason since August 2021, when he began as a student in my first-year Lawyering Seminar. Based on his performance in that course, as well as the conversations I have had with him about his goals as a law student and future lawyer, I believe that he is a strong candidate for a clerkship in your chambers.

Jason consistently stood out in my Lawyering Seminar, making insightful and constructive contributions during every class session. The Lawyering Seminar is an intensive, four-credit course that teaches legal reasoning, professional responsibility, legal writing, and other lawyering skills by integrating clinical methodology with substantive, theoretical, and doctrinal material. Over the course of the semester, Jason interviewed his simulated client, drafted and revised legal memos that analyzed the strengths and weaknesses of his client's claims, and counseled his client about the client's options in light of his research and analysis. Jason performed each task very well; he brought a sensitive, client-centered approach to his interactions with his simulated client, and his legal analysis and writing was thorough, well-reasoned, and concise.

As I got to know Jason through his work in class, I became impressed by his dedication to becoming the best lawyer he can be. He routinely stayed after class and came to my office hours looking for ideas and tips for sharpening his analysis and improving his writing. He wanted to chat about the cases we were reading and how they might affect his client's situation. He absorbed all of the feedback I sent his way, skillfully incorporating it into his subsequent work. And through it all, he remained focused on developing his lawyering skills with an eye toward best serving his future clients. I can't think of a better attitude for a student to bring to their first year of law school.

As I got to know Jason over the past two years, I came to appreciate his drive to be an excellent attorney. Prior to law school, he founded and ran an e-commerce business and managed a restaurant in Manhattan. He learned the value of legal expertise and the harms caused by legal systems that can be so dismissive of basic human needs. He has also been a leader in his community, serving as tenant representative, translating vital legal information, and helping to run a food pantry during the pandemic. And since beginning law school, he has sought out opportunities that will give him a strong foundation for a career in litigation. He has been a summer intern in the Manhattan District Attorney's Office and a civil rights law firm; he has interned with federal and state court judges at the trial and appellate levels; he has completed CUNY's rigorous trial practice course; and next fall he will participate in the law school's Creating Law Enforcement Accountability and Responsibility (CLEAR) Clinic. Taken together, these experiences give Jason a broad perspective on litigation and advocacy and an essential set of lawyering skills that will serve him well as a law clerk.

In short, Jason is a smart, hardworking, and focused law student with an impressive drive to become an excellent lawyer. He is a quick learner who is enthusiastic and curious about the law and legal practice. I would be happy to discuss this recommendation further. I can be reached at 212-222-1008 (cell) and jason.parkin@law.cuny.edu.

Sincerely,

Jason Parkin
Professor of Law

JASON J. ZHENG (He/Him)

265 Cherry Street, Apt. 2H, New York, NY 10002 | (917) 900-2365 | Jason.Zheng@live.law.cuny.edu

Writing Sample

This writing sample is a memorandum of law I wrote for my Trial Practice Seminar. It sets forth the points that we, the Defendants, intend to prove in a Title VII retaliation jury trial. This version of the memorandum contains no edits or feedback from anyone.

PRELIMINARY STATEMENT

Plaintiff Diane Leibovitz brought this action claiming retaliation under Title VII of the 1964 Civil Rights Act (as amended, 42 U.S.C.§§ 2000e et seq.) Defendants Monroe Easter, Joseph Hoffman, and the New York Transit Authority ("TA") (hereby "Defendants") submit this pre-trial memorandum of law setting out the points they intend to prove at trial.

Plaintiff's claim of retaliation is meritless. She can neither make out her prima facie burden nor disprove the Defendants' legitimate non-retaliatory reasons. She failed to establish materially adverse action affecting the terms and conditions of her employment. Instead, the TA's actions benefited her. Even if Plaintiff could establish materially adverse action, she cannot prove that there was a causal connection between this action and her protected activity because Defendants took corrective actions to address her shortcomings before her report. Moreover, the Defendants' legitimate reasons were not pretextual because their actions were normal TA practice.

FACTUAL BACKGROUND

The TA's job is to keep the New York City subway system safe for its 2.8 million daily riders. It is an organization that invests in its employees by promoting from within. Mr. Hoffman and Mr. Easter are great examples of TA lifers, both having spent the last 24-plus years as TA employees, holding numerous positions. Mr. Hoffman began working for the TA in 1988 as a Clerk and held positions as an Electrician, Chief Mechanical Officer, and now the Vice President. (Hoffman Dep. 5:1-10, June 16, 2022). Mr. Easter started his career in 1996 (Easter Dep. 13:20-22, June 24, 2022), and today, he is the 240th Street Maintenance Shop ("240 shop") Superintendent. (Easter Dep. 5:18-21, June 24, 2022). In 2021, while in this leadership role, Mr. Easter had three Deputy Superintendents reporting to him: Charles Figliola, Russell Woodley, and Plaintiff Diane Leibovitz. (Easter Dep. 5:7-13, June 24, 2022).

Plaintiff started working for the TA in 2014 as Director of Budget and Administration. (Leibovitz Dep. 15: 6-10, Aug. 15, 2022). Two years later, the TA invested in her and created a unique position for her to shift from administrative work to operations. (Leibovitz Dep. 31:8-16, Aug. 15, 2022). The TA supported Plaintiff's desire to work in an operational role and made her "Deputy Superintendent in Training" of the 240 shop. Id. Eventually, the TA gave Plaintiff the opportunity to work at the Corona Maintenance Shop ("Corona shop") as an official Deputy Superintendent for the car appearance unit. (Leibovitz Dep. 58: 6-13, Aug. 15, 2022). Approximately five months later, she had the opportunity to work in the inspection unit at the Corona shop. (Leibovitz Dep. 63: 17-21, Aug. 15, 2022). A few months later, she was transferred within the Corona shop again and had the opportunity to work in train troubles. (Leibovitz Dep. 76: 22-24, Aug. 15, 2022). Then, sometime in 2019-2020, she was transferred back to the 240 shop and was in charge of the inspection line unit. (Leibovitz Dep. 83: 8-10, Aug. 15, 2022).

In May of 2021, Monroe Easter was transferred to the 240 shop and became Plaintiff's direct supervisor. (Easter Dep. 4:22-24, June 24, 2022). Mr. Easter oversaw the maintenance of car equipment and ensured service to the "1" train. Id. Mr. Easter observed that Plaintiff was deficient in her knowledge of car equipment and did not have the training to succeed in her position, jeopardizing the safety of subway operations. For example, under her management, there were issues with subway brakes, malfunctions with air conditioners, general maintenance issues, and failure to complete repairs. Mr. Easter had several conversations with Plaintiff about remedying these issues and made recommendations based on his experience and expertise. (Easter Dep. 169, July 21, 2022). The problems were ongoing from May-August, and at one point, another TA employee reported that a subway brake was found on the street after it fell off a suspended train track. (Easter Dep. 211-212, July 24, 2022). This brake incident was a serious matter for the

TA because a 50-pound brake falling from the tracks could lead to severe injuries to pedestrians and outstanding liability for the TA. Issues were ongoing, and rather than write up Plaintiff, Mr. Easter transferred her within the 240 shop to the car desk unit, hoping she would succeed and gain additional experience. (Leibovitz Dep. 8, Aug. 15, 2022).

Mr. Easter was required to complete Plaintiff's annual evaluation and her management performance review ("MPR") by September 2021. On September 17, 2022, Mr. Easter submitted Plaintiff's MPR with an overall grade of "marginal," and Plaintiff signed this MPR. Pl. Ex. 3. Mr. Easter gave her a "marginal" because he held her responsible for the problems at the 240 shop. Plaintiff's failure to communicate effectively with her subordinates and her lack of technical skills were also reasons why she received a "marginal." (Easter Dep. 95:1-10, June 24, 2022). In Plaintiff's MPR, Mr. Easter noted that she lacked the technical skills required for her position. Plaintiff also attested to her inability to address specific technical problems. However, a "marginal" grade does not immediately affect one's employment status. Instead, it highlights areas where an individual needs improvement; the TA will then set forth goals and action items for the individual to address these issues. Pl. Ex. 26. The TA's system is created to help employees improve; this is the TA investing in its employees and not a form of punishment. The MPR is valuable because it is used as a measurement to ensure that employees are meeting the standards necessary to keep subways safe and to invest in employees when they lack a particular skill.

On September 23, 2021, Plaintiff heard about an incident where her fellow Deputy Superintendent Russel Woodley, sexually harassed a car cleaner. Plaintiff followed TA policy guidelines and reported these allegations.

On December 3, 2021, Plaintiff learned of her transfer to the Overhaul Shop at 207th Street ("207 shop"). Vice President Hoffman decided to transfer Plaintiff to receive the necessary

technical training so that she could be more successful in positions requiring superior knowledge of subway trains. (Hoffman Dep. 34, June 16, 2022). At the 207 shop, Plaintiff was mentored by Richard Buffington, an experienced technician whose been with the TA since 1977. (Hoffman Dep. 53, June 16, 2022). Additionally, Mr. Hoffman decided to overrule Mr. Easter and changed Plaintiff's overall MPR rating to a "good" and her other two technical skill "marginal" ratings to "good." (Hoffman Dep. 34, June 16, 2022). Despite Plaintiff's lack of technical skills, Mr. Hoffman took these actions based on his understanding of Plaintiff's work and because he wanted to provide her with technical training without hindering her career. (Hoffman Dep. 34, June 16, 2022).

Mr. Easter made no changes to Plaintiff's MPR grade after submitting it on September 17, 2022, and only learned about its change in December 2021. Pl. Ex. 3.

Plaintiff now brings a Title VII retaliation suit against Defendants for giving her a "marginal" MPR grade and for transferring her to the 207 shop. However, the transfer to the 207 shop notably did not decrease Plaintiff's salary. She got a raise, kept the same title, had a team to manage, and received mentorship and technical training.

ARGUMENTS

DEFENDANTS DID NOT RETALIATE AGAINST PLAINTIFF FOR REPORTING A SEXUAL HARASSMENT INCIDENT

Title VII Section 704(a) prohibits employers from retaliating against employees for opposing discriminatory practices. 42 U.S.C.A. §2000e-3(a).

Retaliation claims under Title VII are evaluated under a three-step burden-shifting analysis. First, Plaintiff has the burden of persuasion to establish a prima facie case of retaliation by showing: "(1) participation in a protected activity [and] that the defendant knew of the protected activity; (2) an adverse employment action; and (3) a causal connection between the protected

activity and the adverse employment action." McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802–05 (1973); Hicks v. Baines, 593 F.3d 159, 164 (2d Cir. 2010).

If Plaintiff sustains this initial burden, "a presumption of retaliation arises." Hicks, 593 F.3d at 164. The burden then shifts to the Defendant to produce and "articulate a legitimate, non-retaliatory reason for the adverse employment action." Id. Once Defendant-employer articulates a legitimate non-retaliatory reason for the alleged adverse employment action, the presumption of retaliation dissipates, and the burden shifts back to Plaintiff, via the burden of persuasion, to show that this reason was pretextual. Zann Kwan v. Andalex Group LLC, 737 F.3d 834, 839 (2d Cir. 2013); Hicks, 593 F.3d at 164.

This brief will argue that, first, Plaintiff failed to establish her initial prima facie burden of retaliation. Specifically, she failed to show there was (A) an adverse employment action; and (B) she failed to show a causal connection between the filing of her sexual harassment complaint and the alleged adverse employment action. Second, even if she was to make her initial prima facie burden, Defendants proffered legitimate non-retaliatory reasons for giving her a "marginal" overall MPR grade and for transferring her. Third, Plaintiff cannot prove by the burden of persuasion that the proffered legitimate non-retaliatory reasons were pretextual.

Defendants do not dispute that Plaintiff acted in good faith when she reported an alleged incident of sexual harassment or that the TA did not have knowledge of her reports. Therefore, this brief will not address these elements of the retaliation claim.

I. Diane Leibovitz Failed To Meet Her Initial Prima Facie Burden Of Retaliation.

Plaintiff failed to show that the TA's employment actions had a materially adverse effect on her because the conduct was beneficial to her, normal TA practice and the terms and conditions of her employment remained the same. Plaintiff also failed to establish a causal link between the

sexual harassment report with the TA's alleged adverse conduct because these actions were in motion before her report.

A. Plaintiff failed to establish adverse action because her transfer was beneficial to her, normal TA practice, and the terms and conditions of her employment remained the same.

"[W]hen considering a retaliation claim, Courts look to see whether the employment actions were materially adverse. Burlington Northern and Santa Fe Ry Co. v. White, 548 U.S. 53, 67 (2006). Materially adverse employment actions are those that deter or "dissuade a reasonable worker from seeking or supporting a charge of discrimination." Id. at 57. There is no per se bright-line rule; instead, Courts will look at the particular circumstances of each case to determine the significance of any given act of retaliation in its context. Id. at 67. However, the threshold inquiry in finding adverse employment action is that the action must entail: (1) a change in working conditions that are more disruptive than a mere inconvenience; or (2) an alteration of job responsibilities. Terry v. Ashcroft, 336 F.3d 128, 138 (2d Cir. 2003).

Examples of materially adverse changes include termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguishable title, a material loss of benefits, and significantly diminished material responsibilities. Id. at 138. A negative evaluation is not, by itself, sufficient to constitute a materially adverse employment action. Sanders v. New York City Human Resources Admin., 361 F.3d 749, 756 (2d Cir. 2004). However, negative or critical evaluations can support a case of retaliation when Plaintiff can offer proof that the evaluation affected the terms and conditions of their employment. Id. For a Plaintiff to establish that regular disciplinary actions or corrective actions, either on their own or in conjunction with other acts, were retaliatory, they must present evidence that these actions demonstrated a departure from the

organization's normal practices. Rivera v. Rochester Genesee Regl. Transp. Auth., 743 F.3d 11, 26 (2d Cir. 2014).

Trivial harms, petty slights, or minor annoyances do not amount to adverse employment action. Tepperwien v. Energy Nuclear Operations, Inc., 663 F.3d 556, 571 (2d Cir. 2011). Even if a Plaintiff can demonstrate that the employer engaged in multiple trivial actions, it does not amount to retaliation. Id. at 572. Criticism of an employee is part of training and is necessary for employees to develop and improve; thus, criticism by an employer is not automatically an adverse employment action. Weeks v. New York State (Div. of Parole), 273 F.3d 76, 85 (2d Cir. 2001).

Here, Plaintiff fails to establish a prima facie case of retaliation. First, the MPR grade had no adverse effect on Plaintiff. Her initial grade was "marginal," but it ultimately became "good." During the time between her "marginal" and "good," she had the same salary, received the same benefits, held the same title, and the terms and conditions of her employment all remained the same. Moreover, Mr. Easter followed normal TA practice when he gave her this grade. This grade, alongside its detailed comments, was meant to highlight areas where she needed improvement. This is not an adverse action but merely constructive criticism necessary for Plaintiff's professional development.

Second, Plaintiff's transfer to the 207 shop was also normal TA practice; TA employees are always transferred for training or promotions. Plaintiff herself has been transferred seven times during the past five years. Her transfer to the 207 shop benefited her because she was mentored by Richard Buffington, a TA technician since 1977 with a wealth of operational and technical experience. Under Mr. Buffington, Plaintiff could get the technical training required for someone in her position. See Galabya v. New York City Bd. of Educ., 202 F.3d 636, 641 (2d Cir. 2000) (for a transfer to be considered materially adverse action, a Plaintiff must show that the transfer created

a materially significant disadvantage). This is part of the TA system: ensuring subway riders that their operational employees are adequately equipped with the technical skills to do the job.

Plaintiff may argue that she felt anxious for the four months before receiving an overall "good" on her MPR in December and therefore suffered an adverse action. However, this argument fails because it is normal for the TA to finalize her grades around December. Moreover, during this period, the conditions of her employment remained the same. She might also argue that the transfer to the 207 shop placed her in a non-budget position and thus was adverse. However, this argument also fails because she held the same title and received a pay raise while at the 207 shop. See, e.g., Fairbrother v. Morrison, 412 F.3d 39, 56 (2d Cir. 2005) (if a transfer does not create a significant change in the conditions of employment, and if it only changes some of the plaintiff's job responsibilities, then this transfer cannot be considered materially adverse); Kessler v. Westchester County Dept. of Soc Services., 461 F.3d 199 (2d Cir. 2006) (the Court found no adverse action by the transfer of the plaintiff because it was not less prestigious nor was it less suited to her skills and experience).

Therefore, Plaintiff suffered no materially adverse action to support her retaliation claim.

B. Plaintiff failed to show a causal connection because the Defendant-employer's action began before she reported sexual harassment.

Title VII retaliation claims require proof of but-for causation that the unlawful retaliation would not have occurred in the absence of the employer's alleged wrongful action or actions. University of Texas Southwestern Medical Center v. Nassar, 570 U.S. 338, 360 (2013). But-for causation does not require proof that retaliation be the sole cause of the employer's alleged adverse action. However, Plaintiff must show that the adverse action would not have occurred in the absence of the retaliatory motive. Zann Kwan, 737 F.3d at 846. Plaintiffs often seek to establish causation indirectly through temporal proximity at the prima facie stage by showing that the

alleged adverse employment action followed the protected activity closely in time. Id. at 845. However, employers are not obligated to abandon corrective measures upon learning of a Plaintiff's protected activity. Clark County School Dist. v. Breedan, 532 U.S. 268, 274 (2001) ("[e]mployers need not suspend previously planned transfer upon discovering that a Title VII suit has been filed, and their proceeding along lines previously contemplated, though not yet definitely determined, is no evidence whatever of causality.") (emphasis added).

Here, Plaintiff cannot show that her transfer to the 207 shop and MPR grade would not have occurred if she had not reported the alleged sexual harassment. Plaintiff's well-documented performance problems began before she filed her report, and the Defendants had already begun to take corrective actions. Mr. Easter, in August 2021, reassigned Plaintiff from inspections to car desk because of her lack of operational knowledge. Mr. Easter drafted, signed, and submitted Plaintiff's annual MPR, with a "marginal" grade, on September 17, 2021, and Plaintiff filed the sexual harassment report six days later, on September 23, 2021. Mr. Easter always intended for his evaluation of Plaintiff to be a "marginal" overall rating. Moreover, due to the 240 shop's poor performance and low morale, Mr. Hoffman already intended to "blow" the 240 team up. Thus, these corrective measures by Defendants were already in motion before Plaintiff's report.

Therefore, there is no causal link between her sexual harassment report and her transfer to the 207 shop and MPR grade to support her retaliation claim.

II. The TA Proffered A Legitimate Non-Retaliatory Reason For Transferring the Plaintiff.

If Plaintiff could establish her initial prima facie burden, it then shifts to the employer to articulate some legitimate, non-retaliatory reason for the employment action. Zann Kwan, 737 F.3d at 845. This showing is easily satisfied. See, e.g., Zann Kwan, 737 F.3d at 845 (unsuitability of skills and poor performance satisfies as a legitimate reason for employment action); Jute v.

Hamilton Sunstrand Corp., 420 F.3d 166, 179 (2d Cir. 2005) (company restructuring satisfies as a legitimate reason for employment action); Wang v. State Univ. of New York Health Scis Ctr. At Stony Brook, 470 F.Supp.2d 178, 185 (E.D.N.Y. 2007) (factual discrepancies regarding a plaintiff's professional background and verification of professional credentials satisfies as a legitimate reason for employment action); Giscombe v. N.Y.C. Dep't of Educ., 39 F. Supp. 3d 396, 403 (S.D.N.Y. 2014) (allegations of sexual misconduct requiring disciplinary action satisfies as a legitimate reason for employment action); Quinn v, Green Tree Credit Corp., 159 F.3d at 770-71 (2d Cir. 1998) (employee's history of rudeness towards clients and coworkers satisfies as a legitimate reason for employment action).

Here, the legitimate non-retaliatory reason for transferring Plaintiff was that she lacked the technical knowledge to perform her duties as a Deputy Superintendent. Her shortcomings are well documented: (1) the subway cars' brake shoes incident under her supervision; (2) consistent air conditioning system malfunctions under her watch; (3) her lack of technical skills; and (4) her failure to communicate effectively to subordinates. All these issues were documented. Instead of firing her, the TA invested in her by transferring her to get the proper training and mentorship.

Therefore, Defendants satisfied their burden to proffer a legitimate non-retaliatory reason for their alleged adverse actions.

III. Plaintiff Failed To Show That Defendants' Non-Retaliatory Reasons Were Pretextual.

Once an employer offers a legitimate non-retaliatory reason for the alleged adverse action, the burden shifts back to Plaintiff to show that this reason was pretextual. A Plaintiff may show pretext by demonstrating weaknesses, implausibility, inconsistencies, incoherencies, or contradictions in the employer's proffered reasons that would raise doubt in the fact finder's mind that the employer did not act for those reasons. Zann Kwan, 737 F.3d at 839, 845 (finding the

employer's reasons were pretext because they waivered by giving two extremely different reasons for their action toward the plaintiff).

Mere conclusory allegations cannot dispel Defendants' non-retaliatory legitimate reasons as pre-textual. Wang, 470 F.Supp.2d at 185. While temporal proximity is sufficient to show causation at the initial prima facie level, temporal proximity alone cannot rebut the employer's legitimate non-discriminatory reason as pretextual. El Sayed v, Hilton Hotels Corp., 627 F.3d 931 (2d Cir. 2010). Thus, to show pretext, Plaintiff must combine temporal proximity with other evidence, such as inconsistent employer explanations. Zann Kwan, 737 F.3d at 848.

Here, The TA's reason for Plaintiff's transfer never wavered. She was transferred because she lacked the proper technical skills and training to perform her job safely. Mr. Easter always intended to give Plaintiff a "marginal" grade – hence, he did it before her sexual harassment report. Furthermore, revising the MPRs is a normal TA practice. First, the direct supervisor will grade the employee, and after a few revisions and a few months, the Vice President will sign off on the final grade. Every reason Defendants provided are legitimate and not pretextual because they were either the company's normal practice or the conduct was already in motion and decided before Plaintiff's complaint.

Therefore, Plaintiff cannot establish a retaliation claim because Defendants' legitimate non-retaliatory reasons are not pretextual.

CONCLUSION

Plaintiff failed to establish a prima facie case of retaliation. She failed to prove that her report of sexual harassment was the but-for cause of her MPR grade and her transfer to the 207 shop. On the other hand, Defendants successfully met their burden and offered a legitimate non-retaliatory reason for Plaintiff's transfer and MPR grade. These reasons were also not pretextual

because transferring employees for additional technical training is a normal TA practice, and Mr. Easter's "marginal" grade of Plaintiff's occurred before her report. Therefore, the Court should dismiss this retaliation claim.

Applicant Details

First Name	**Daniel**
Last Name	**Zonas**
Citizenship Status	**U. S. Citizen**
Email Address	**danielzonas@yahoo.com**
Address	**Address** Street **3000 Chautauqua Ave #222** City **Norman** State/Territory **Oklahoma** Zip **73072**
Contact Phone Number	**2392502578**

Applicant Education

BA/BS From	**Florida State University**
Date of BA/BS	**May 2021**
JD/LLB From	**University of Oklahoma College of Law** **http://law.ou.edu**
Date of JD/LLB	**May 15, 2024**
Class Rank	**30%**
Law Review/Journal	**Yes**
Journal(s)	**Oil and Gas, Natural Resources, and Energy Journal**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Nicholson, Daniel
dnicholson@ou.edu
Jon, Lee
jon.lee@ou.edu
Gensler, Steven
sgensler@ou.edu

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Daniel Zonas

(239) 250-2578 - danielzonas@yahoo.com

6/23/2023

Judge Walker:

I am writing to apply for a 2024-2025 clerkship with your chambers. I moved from Naples, Florida to Norman, Oklahoma to start my legal career in 2021, and I am now a 3L at the University of Oklahoma College of Law.

I like researching and writing about novel legal issues. As far as I can tell, clerking for you would be the best opportunity in the world because a federal docket contains almost every type of case there is.

I would do great work as a federal clerk. I am an Articles Editor for the Oklahoma Oil and Gas, Natural Resources, and Energy Journal, so I will be editing and proofreading my peers' work during the 2023–2024 schoolyear. During my internships, I have drafted countless pleadings and other papers, including a brief that was argued at the Oklahoma Supreme Court. I've researched and written memoranda on all sorts of topics, everything from defenses for criminal charges to the viability of a nuisance claim arising from dog barking. My supervising attorneys rely on my work because I make sure it's correct and clearly written. Nevertheless, when I write, I like to focus not just on accuracy and clarity, but also conciseness. Every sentence is more words that the reader needs to slog through, so I keep wordiness to a minimum.

I am confident that my educational and professional experience will make me an asset. Please let me know if we can schedule an interview. I want this clerkship, and I will work hard for you if I get it.

Respectfully,
Daniel Zonas

Daniel Zonas

(239) 250-2578 - danielzonas@yahoo.com

Education

University of Oklahoma College of Law 2021–2024

- GPA: 9.339/12.0 (equivalent to 3.4/4.0)
- Rank: 59 of 201
- Articles Editor for the Oil and Gas, Natural Resources, and Energy Journal
- Dean's Honor Roll Fall 2021 and Spring 2023
- Amicus Society Public Interest Fellow, over 250 pro-bono hours

Florida State University 2017–2021

- B.A. in Philosophy

Professional Experience

Jason Waddell, PLLC Summer 2023
Law Clerk *Oklahoma*

- Drafted a Brief in Support of Application for Writs of Prohibition & Mandamus regarding an Order enforcing overbroad subpoenas duces tecum.
- Drafted countless pleadings, including a Motion for Summary Judgment for a breach of contract claim, a Motion to Strike regarding improper affidavits, and a response to a Motion to Dismiss for a dog bite case.
- Attended many depositions and hearings.

Mazaheri Law Firm Spring 2023, Summer 2023
Law Clerk *Oklahoma*

- Drafted a Response to a Position Statement for a Title VII retaliation claim.
- Drafted many research memoranda, including the legality of a tipping policy, defenses for a reckless conduct charge, and venue for a property dispute.
- Drafted several divorce decrees and an antenuptial agreement.
- Drafted many demand letters, EEOC charges, and discovery requests.

Oklahoma County District Attorney's Office Summer 2022
Law Clerk *Oklahoma*

- Assisted ADAs in the Oklahoma County Diversions program.
- Managed restitution for Diversion Court participants.
- Attended many trials, hearings, and arraignments.
- Drafted a Motion to Dismiss for the Felonies Team.

Schwartz & Zonas Summer 2018, Summer 2019
Receptionist *Florida*

- Handled client intake for personal injury and criminal defense attorneys.

The University of Oklahoma College of Law

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Norman, OK 73019
(405) 325 - 4699
http://www.law.ou.edu

Grade Points

A+	12
A	11
A-	10
B+	9
B	8
B-	7
C+	6
C	5
C-	4
D+	3
D	2
D-	1
F	0

THE UNIVERSITY OF OKLAHOMA COLLEGE OF LAW UNOFFICIAL TRANSCRIPT

Zonas, Daniel Patrick
716 W Saint Augustine St
Tallahassee, FL 32304-4330

Course	Dept	No.	Hours	Grade
Fall 2021				
Legal Foundations	LAW	6100	1	S
Property	LAW	5234	4	B+
Torts	LAW	5144	4	A-
Research/Writing & Analysis I	LAW	5123	3	B+
Civil Procedure I	LAW	5103	3	B+
GPH: 14	GPS: 130	HA: 15	HE: 15	GPA: 9.286
Spring 2022				
Criminal Law	LAW	5223	3	B+
Civil Procedure II	LAW	5203	3	A-
Intro to Brief Writing	LAW	5201	1	B+
Constitutional Law	LAW	5134	4	B
Oral Advocacy	LAW	5301	1	B
Contracts	LAW	5114	4	B
GPH: 16	GPS: 138	HA: 16	HE: 16	GPA: 8.625
Summer 2022				
Extern Placement	LAW	6400	3	S
Issues in Professionalism	LAW	6400	2	S
GPH: 0	GPS: 0	HA: 5	HE: 5	GPA: 0.000
Fall 2022				
Evidence	LAW	5314	4	A
Trademarks	LAW	6223	3	A-
Oil and Gas	LAW	6540	3	B
Professional Responsibility	LAW	5323	3	B+
ONE J	LAW	6331	1	S
GPH: 13	GPS: 125	HA: 14	HE: 14	GPA: 9.615
Spring 2023				
Family Law	LAW	5443	3	B+
Secured Transactions	LAW	5750	3	A-
Torts II	LAW	6100	2	B+
Oil and Gas Contracts and Tax	LAW	6550	3	A
Tort Law/Communications Media	LAW	6700	2	A
GPH: 13	GPS: 130	HA: 13	HE: 13	GPA: 10.000
Fall 2023				
Crim Pro: Investigation	LAW	5303	3	

Income Taxation of Individuals	LAW	5463	3	
Civil Pretrial Litigation	LAW	5530	3	
Unincorporated Entitities	LAW	5733	3	
Workers' Compensation	LAW	6100	2	
Trial Techniques	LAW	6410	3	
GPH:	GPS:	HA:	HE:	GPA:

	GPH	**GPS**	**HA**	**HE**	**GPA**
OU CUM:	56	523	63	63	9.339

UNOFFICIAL END OF RECORD ***UNOFFICIAL***

The University of Oklahoma

COLLEGE OF LAW

DANIEL NICHOLSON
ASSOCIATE PROFESSOR OF LEGAL PRACTICE
UNIVERSITY OF OKLAHOMA LAW CENTER
300 WEST TIMBERDELL ROAD
NORMAN, OKLAHOMA 73019
Phone:(405) 405-325-5634
E-mail: dnicholson@ou.edu

June 11, 2023

Dear Judge:

I am writing this letter on behalf of Daniel Zonas a law student who has applied for a federal clerkship. I had the pleasure of having Daniel as a 1L in Research/Writing & Analysis I, Intro to Brief Writing, and Oral Advocacy classes. Daniel is a diligent and capable student who has consistently shown strong skills in legal research, writing, and analysis. He has a solid understanding of complex legal concepts and has the ability to articulate them effectively in writing. In my legal writing class, Daniel produced well-reasoned legal documents, displaying his knowledge of the law and its practical application.

Apart from his academic achievements, Daniel is motivated to keep learning about the practice of law outside of classes. His resume notes that he has drafted many court documents for practicing attorneys since his 1L year. While I haven't had an opportunity to interact with Daniel since having him in class, I'm happy to see he has continued honing his legal writing and critical thinking skills.

Based on Daniel's academic performance, writing ability, and work ethic, I believe he would be a suitable candidate for a federal clerkship. I have confidence that he possesses the necessary qualities and abilities to fulfill the responsibilities of this role. He will make valuable contributions to any court he has the opportunity to join.

If I may be of further assistance, please do not hesitate to telephone or write me.

Sincerely,

Daniel Nicholson
Associate Professor of Legal Practice
OU College of Law

The UNIVERSITY of OKLAHOMA
College of Law

June 26th, 2023

The Honorable Jamar Walker
United States District Court for the Eastern District of Virginia
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Re: Recommendation for Daniel Zonas

Dear Judge Walker,

I have been asked to write a letter in support of Daniel Zonas' application for a clerkship in your chambers. Last fall, I had the pleasure of working closely with Daniel in my Evidence and Trademark Law courses. Based on my interactions with him and his performance in my courses, I am confident that Daniel would be an asset to your chambers.

Without question, Daniel was a standout student in both my Evidence and Trademark Law courses. Ordinarily I would not recommend that students take both courses at the same time; Evidence is incredibly dense, and Trademark Law is exceedingly nuanced. But Daniel seemed to easily handle the workload in both courses. When he was on call (which is frequent in my classes), he was extremely engaged and thoughtful in his responses. Daniel's voice is not the loudest in the room, but when he speaks other students listen. He emerged as one of the "quiet" leaders in the classroom, and other students looked to him for guidance.

Daniel also made it a point to come to see me during my office hours. He has a group of "study buddies" that work together on the problems, and I can tell that they get along quite well together. That type of collegiality will serve him well as he transitions to the next phase of his career. But once again, Daniel was the natural leader in that group. He came to office hours prepared with a list of questions and tentative answers, making our time together more productive. He did not always have the correct answers, but he had clearly made the effort to think critically about them before speaking with me.

Daniel's exam performance was among the strongest in both classes. To be honest, I am a difficult grader and have high expectations. So, for him to get A-range grades in both classes is impressive. The Trademark Law class in particular was a very talented group of students, and it had a significant percentage of third-year students. Yet Daniel performed quite well in that class and had one of the highest exam scores. My sense is that perhaps Daniel did not perform as well in his first year of law school, but clearly by the time he enrolled in my classes he completely understood what he needed to do to excel.

Andrew M. Coats Hall, 300 Timberdell Road, Norman, Oklahoma 73019-5081, PHONE: (405) 325-4699
WEBSITE: LAW.OU.EDU

In terms of Daniel's work style and interpersonal skills, I found him to be an extremely diligent worker and very receptive to suggestions and constructive criticism. If I were to classify Daniel, it would be as a "doer"—he gets things done without question. That said, he brings ideas to the table as well. As a former federal appellate clerk myself, I like to think that I know what types of law students would make excellent clerks. Daniel seems to fit that mold well.

There is no doubt that Daniel Zonas has the requisite intellect and training to make an excellent judicial clerk. However, I strongly believe that his strong work ethic, collegial personality, and his adaptability will truly make him an excellent addition to your chambers.

Please let me know if you have any questions or would like additional information.

Regards,

Jon J. Lee

Professor Nicholson | Word Count: 4993 | Daniel Zonas § 3B
Mar. 14, 2022
Appellate Brief

NO. 22-050

IN THE
SUPREME COURT OF THE UNITED STATES
SPRING TERM, 2022

JAMIE WHITTEN,

Petitioner,

v.

STATE OF GARNER,

Respondent.

On Writ of Certiorari to the
Garner Supreme Court

BRIEF FOR PETITIONER

Daniel Zonas
Attorney for Petitioner

Professor Nicholson Word Count: 4993 Daniel Zonas § 3B
Mar. 14, 2022
Appellate Brief

QUESTION PRESENTED

The First Amendment provides "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." However, some states have passed legislation prohibiting video recording of police officers without all-party consent.

The state of Garner passed an anti-surreptitious recording law prohibiting the creation of any sort of recording containing any conversation without all-party consent or prior warning. After recording her own arrest during a rowdy protest and subsequent interactions with her arresting officers, Whitten was charged with violating the statute.

Did this application of the Garner statute violate Whitten's First Amendment rights?

Professor Nicholson | Word Count: 4993 | Daniel Zonas § 3B
Mar. 14, 2022
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OPINIONS BELOW

The opinion of the District Court is unavailable. The opinion of the Supreme Court of Garner is available in the Record. (R. at 2–8.)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the application of the First Amendment of the United States Constitution, which provides: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." U.S. Const. amend. I. This case also involves the interpretation and application of Garner Statute title 75, § 52, which prohibits recording any conversation "without the consent of all parties" or otherwise without warning. (R. at 8–9.)

Professor Nicholson Word Count: 4993 Daniel Zonas § 3B
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Appellate Brief

STATEMENT OF THE CASE

Jamie Whitten attended an animal rights protest at Wild Animal Safari, where there was a large crowd being subdued by law enforcement. (R. at 3–4.) The protest was an open demonstration that took place on private property open to the public. (R. at 6.) While police officers attempted to control the protestors, Whitten began recording the protest on her iPhone. (R. at 4.) She then placed her phone in her pocket while it continued to record. (R. at 4.)

Subsequently, Whitten was arrested on unrelated charges. (R. at 4.) She continued to record as she was being arrested. (R. at 4.) Whitten recorded her conversation with the police officers while in the patrol car. (R. at 4.) Her iPhone continued to record until just before she was placed in her holding cell, where it was confiscated and the recording was terminated by the police. (R. at 4.)

Whitten was charged with violation of Garner's Anti-Surreptitious Recording Privacy Law for filming her arrest and later conversation with the police in the patrol car. (R. at 5.)

SUMMARY OF THE ARGUMENT

This Court should reverse the decision of the Supreme Court of Garner and remand this case for further proceedings. The Fourteenth Circuit is made an outlier among precedent from other circuits from this decision, and the Supreme Court of Garner caused an artificial circuit split to turn into a real circuit split. Other circuits have held that one has a First Amendment right to record police officers

performing their duties in public spaces, and Whitten's case falls within these boundaries.

The Garner statute limits recording rights, which infringes upon First Amendment rights. The statute prohibits the recording of conversations without consent. The recordings created through this activity are categorically different from any other sort of recordings. Since the statute's goal of privacy cannot be justified without reference to this type of content, the Garner statute is content-based and should be analyzed under strict scrutiny.

Even if this Court must apply intermediate scrutiny, the Garner statute is still unconstitutional as applied to Whitten. Under intermediate scrutiny, protecting police privacy as individuals undermines the right of the public to receive information about government activity. As such, the government interest in the Garner statute is not substantial and cannot be justified under intermediate scrutiny.

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ARGUMENT AND AUTHORITIES

THE GARNER ANTI-SURREPTITIOUS RECORDING STATUTE IS UNCONSTITUTIONAL AS APPLIED TO JAMIE WHITTEN.

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." U.S. Const. amend. I. The right to freedom of speech listed in the First Amendment to the U.S. Constitution is applicable to the states through the Due Process Clause of the Fourteenth Amendment. *Gitlow v. New York*, 268 U.S. 652 (1925). The state of Garner's Anti-Surreptitious Recording Privacy Law is competing with the right to free speech in this case. (R. at 8.) The state of Garner passed this statute under its authority to protect a person's general right to privacy, a privilege granted to the states. *Katz v. United States*, 389 U.S. 347, 350–51 (1967). This regulation prohibits recording a conversation surreptitiously or otherwise without consent or prior warning. (R. at 8–9.) The regulation leaves an exception for verified journalists, who are granted authority to film interactions between police officers and citizens by being immune to the Garner statute. (R. at 9.)

The Garner statute burdens First Amendment rights, as the right to free speech encapsulates free sharing of information, which entails the right to create such information. *Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184, 1203 (9th Cir. 2018). Furthermore, the state of Garner's purpose in enacting this legislation is to regulate specific content, conduct that warrants analysis under strict constitutional scrutiny. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

Professor Nicholson Word Count: 4993 Daniel Zonas § 3B
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This Court should reverse the Garner Supreme Court's ruling and find the Garner statute unconstitutional as applied to Whitten. Applying the Garner statute to individuals recording police officers performing their duties on public property and private property open to the public violates fundamental rights of individuals granted under the First Amendment. These rights are substantial enough to render the Garner statute unjustifiable.

This case involves a constitutional inquiry and is therefore reviewed de novo. U.S. Const. art. III, § 3; *see also Marbury v. Madison*, 5 U.S. 137 (1803).

A. The Garner statute should be analyzed under strict scrutiny.

1. The Garner statute restricts First Amendment rights.

The First Amendment of the Constitution of the United States holds, "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." U.S. Const. amend. I. This extends beyond the right to share information and includes the right to create such information, like an audiovisual recording. *Am. C.L. Union of Illinois v. Alvarez*, 679 F.3d 583, 595–96 (7th Cir. 2012). The right to free speech "would be insecure, or largely ineffective, if the antecedent act of *making* [a] recording is wholly unprotected . . . ." *Id*. Agreement is "practically universal" that a primary purpose of the First Amendment is to protect "free discussion of government affairs." *Id*. at 597. The government may not overstep the First Amendment protection of the free sharing of information by simply regulating the means by which such information is gathered. *Id*. Protecting a video under the

First Amendment but not the creation of that video "defies common sense." *Wadsen*, 878 F.3d at 1203.

The Garner statute prohibits audio and/or video recordings of conversations without all-party consent. Whitten was charged with violating this statute in relation to the recording she produced in the police car. Plainly, this statute prohibits the creation of certain audiovisual recordings, behavior that is protected by the First Amendment. So, the Garner statute restricted Whitten's First Amendment rights.

2. The Garner statute is a content-based restriction, and should be subject to strict scrutiny.

Statutes that burden constitutional rights are unconstitutional unless they are able to survive an applicable level of scrutiny. *Alvarez*, 679 F.3d at 601–02. Freedom of expression is "subject to reasonable time, place, or manner restrictions." *Clark v. Cmty. For Creative Non-Violence*, 468 U.S. 288, 293 (1984). These restrictions are valid if they are content-neutral and meet an intermediate scrutiny standard. *Id*. Contrarily, content-based restrictions must meet the standard of strict scrutiny. *Alvarez*, 679 F.3d at 603. Content-neutrality depends on the purpose of the regulation in question. *Id*. "Regulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny . . . because in most cases they pose a less substantial risk of excising certain ideas or viewpoints from the public dialogue." *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 642 (1994). If a regulation's purpose is unrelated to the content of expression, it's content-neutral. *Ward*, 491 U.S. at 791. This holds true even if "it has an incidental effect on some

speakers or messages but not others." *Id*. Thus, "[t]he government's purpose is the controlling consideration." *Id*. A law is content-based if it was enacted "because of disagreement with the message [speech] conveys." *Id*. Importantly, a "facially content-neutral" law can be content-based if it "cannot be "'justified without reference to the content of the regulated speech . . . .'"" *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 164 (2015) (quoting *Ward*, 491 U.S. at 791).

The Garner statute distinguishes and prohibits some types of content. It disallows recordings made secretly, and allows recordings made with consent or a warning. Secret recordings are different in content from recordings made with consent. Individuals who know they are being recorded act differently than if they are being recorded secretly, entailing different recordings being made. Crucially, if both secret and permissive recordings were to share the same content, there would be no purpose served in banning one of them but not the other. So, the Garner statute necessarily categorically bans some types of content.

The fact that the Garner statute bans some types of content and not others does not entail that it's content-based. Instead, one must look to the government's purpose to determine whether the statute is content-based. The government's purpose in the Garner statute can be found in its name, "Anti-Surreptitious Recording Privacy Law." (R. at 8.) Clearly, the regulation was put in place for the sake of individual privacy. However, what is also present in the statute title is the means by which the state attempts to achieve this end, "Anti-Surreptitious

Recording." So, the goal of the statute is individual privacy, and the means is the prohibition of secret recordings.

A surreptitiously recorded video may have no definitive signs that it was recorded without consent. However, it remains unique content enabled by one's ability to record without consent. Such a recording would not exist without an ability to create it. Furthermore, once it does exist, the government cannot distinguish content that was secretly recorded from content that was recorded with consent even though they are separate types of content, one of which the government has an interest in prohibiting.

It's important to understand that the means are intimately tied to the ends of the Garner statute. The statute cannot be construed without regulating specific content. In fact, the only reason the statute is effective is because it regulates expression based on the substance of that expression's content. According to *Turner*, the purpose of intermediate scrutiny being applied to content-neutral regulations is because they don't pose as much risk in eliminating certain viewpoints. However, the Garner statute is wholly founded on which content the government deems appropriate.

Content that is obtained surreptitiously is not regulated because of the means through which it was obtained. Instead, it's regulated because of government disapproval of the content itself. The regulation of surreptitiously gathered content is not incidental, but the integral and primary goal of the statute. The goal of privacy in this statute's context cannot be justified without reference to its means,

which consists of content discrimination and regulation. As such, in congruence with the standard in *Reed*, the Garner statute is content-based and should be subject to strict scrutiny.

B. The Garner statute survives neither intermediate nor strict scrutiny as applied to Jamie Whitten and is therefore unconstitutional.

In order to survive strict scrutiny, a law must be "necessary to serve a compelling state interest" and "narrowly drawn to achieve that end." *Wadsen*, 878 F.3d at 1204. In order to survive intermediate scrutiny, a law must be "narrowly tailored to serve a substantial government interest." *Ward*, 491 U.S. at 789. If a law fails an intermediate scrutiny test, it will also fail a strict scrutiny test. *Alvarez*, 679 F.3d at 604. However, if a law does not fail an intermediate scrutiny test, it may still fail a strict scrutiny test. *Id.*

Although strict scrutiny should apply to this case, the Petitioner recognizes the possibility that this Court may not accept its argument for strict scrutiny. Even if intermediate scrutiny should apply, however, the Garner statute does not survive and is unconstitutional as applied to Whitten. Strict scrutiny is a heightened form of intermediate scrutiny, maintaining the same elements and relationship between them. Therefore, the following argument will be tailored to the less constitutionally demanding standard of intermediate scrutiny, but remains unchanged in substance if strict scrutiny is determined to be the applicable standard.

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1. Individuals have a right to record police officers performing their duties in public spaces.

The driving force behind the right to record police officers performing their duties is the interest the public has in the "free discussion of government affairs." Gregory T. Frohman, Comment, *What Is and What Should Never Be: Examining the Artificial Circuit "Split" on Citizens Recording Official Police Action*, 64 Case W. Res. L. Rev. 1897, 1908 (2014). There is a significant "role of police recordings in exposing police conduct to the public." *Id*. at 1903. This interest is substantial, and a muscle that is used to "distinguish a free nation from a police state." *Glik v. Cunniffe*, 655 F.3d 78, 84 (1st Cir. 2011). Distinctly, "a person's general right to privacy" is "left largely to the law of the individual states." *Katz*, 389 U.S. at 350–51.

Numerous circuits have recognized a right to record police officers performing their duties in public spaces. Gregory T. Frohman, *What Is and What Should Never Be: Examining the Artificial Circuit "Split" on Citizens Recording Official Police Action* 1897, 1940 (2014). In fact, on this question, there only exists an "artificial circuit split," where some courts affirm the right exists and others dodge the question by instead dealing with qualified immunity and whether the right is "clearly established." *Id*. This strategy stems from the decision in *Pearson v. Callahan*, where the Supreme Court vested discretion in district and circuit court judges to decide which prong of qualified immunity should be addressed first. *Pearson v. Callahan*, 555 U.S. 223, 236 (2009). These prongs are, (1) whether there is a violation of a constitutional right, and (2) whether that right was clearly

established at the time. *Id*. If a court chooses to tackle prong (2) and finds that a constitutional right is not clearly established, its analysis could end there. *Id*. In fact, because of this allowance, no courts have specifically denied the existence of the right to surreptitiously record police officers performing their duties. Frohman, *supra* at 1940.

In *Shevin v. Sunbeam Television Corp.*, a Florida wiretapping statue's constitutionality was challenged. *Shevin v. Sunbeam Television Corp*., 351 So. 2d 723, 725 (Fla. 1977). Sunbeam Television Corp., a news company, claimed that "secret recordings" prohibited by the statute had value to the public in that they assured accuracy of recordings made. *Id*. However, the court found the statute to be constitutional, holding that "hidden mechanical contrivances are not indispensable tools of news gathering." *Id*. at 727. Some cases have established an affirmative right to secretly record police officers performing their duties. *Fields v. City of Philadelphia*, 862 F.3d 353, 355 (3d Cir. 2017). In *Fields v. City of Philadelphia*, two individuals, one of which was arrested, brought suit against the city for retaliation against their recording of police officers performing duties on a public sidewalk and at a convention center, respectively. *Id*. at 356. *Fields* affirmed the individuals had a First Amendment right to carry this out, citing the importance of accessing "information regarding public police activity." *Id*. at 359. Furthermore, in *Glik*, an individual was arrested after videotaping police officers carrying out another individual's arrest in a park. *Glik*, 655 F.3d at 79. The court found through an unabridged qualified immunity analysis that this person had a First Amendment

right to film the arrest because it was a "matter of public interest" and was carried out in a public space. *Id.* at 84.

In addition to citing a "right to record matters of public interest," the court noted that "news-gathering protections of the First Amendment cannot turn on professional credentials or status." *Id.* at 83–84. The latter point was supported by the idea that one's right to access information is "coextensive" with that of the press, and a contemporary news story is "just as likely" to be produced by an individual as an actual reporter. *Id.* Additionally, in *Smith v. City of Cumming*, an individual was prevented from taking a video of police actions in violation of his First Amendment rights. *Smith v. City of Cumming*, 212 F.3d 1332, 1332 (11th Cir. 2000). The court determined that the individual did in fact have this right to film, and nothing that the "press generally has no right to information superior to that of the general public." *Id.* at 1333.

The court in *Shevin* did not err in its ruling, and presents no impediment to Whitten's case. *Shevin* is similar to the instant case in that it involves a wiretapping statute prohibiting a type of recording that is valuable to the public. However, the major difference is that the challenge to the Florida wiretapping statute makes no reference to recording police officers. This fact is what sets *Shevin* apart from Whitten's case and prevents it from contributing to the circuit split on this issue.

The case at hand is much more similar in nature to *Fields* and *Glik*, which involve the videotaping of police officers. A rationale frequently cited in these types

of cases includes informing the public of police activity and newsgathering for dissemination of government affairs. This rationale is not mentioned in *Shevin*. The available cases addressing whether one has a First Amendment right to record police officers while performing their public duties show a clear trend in the affirmative. The public has an undeniable right to monitor the proper fulfillment of police duties, which should be subject to only reasonable restrictions. This is the integral component of Whitten's case that sets her aside from other newsgatherers such as the one in *Shevin*.

One might argue that the Garner statute overcomes the need to afford the public this right to record by granting special privileges to "verified journalists." (R. at 9.) However, this does not stop the statute from violating essential public First Amendment rights. This Court should follow precedent from *Glik* and *Smith* on this issue. While such an exception allows a pathway for exposure of police conduct, *Glik* makes a relevant note that this right is shared by all of the public, and cannot be limited to just reporters. Contemporary technology standards don't make reporters obsolete, but they do influence the scope of people able to gather information. When that information is of particular First-Amendment-protected public interest, government limitation is unconstitutional. In a society with protected free speech, it is important to ensure every person has a right to access information, without qualifications and restrictions.

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The government's interest in individual privacy is not compelling enough to overcome the individual First Amendment right to record police officers performing their duties in public.

2. The right to record police officers performing their duties includes private property that acts as a public space in addition to public property.

The reasoning in *Glik* is limited to "public" spaces. *Glik*, 655 F.3d at 84. The recording in *Glik* took place in a public park. *Id.* at 79. However, in *Gericke v. Begin*, an individual was arrested for filming another individual's traffic stop. *Gericke v. Begin*, 753 F.3d 1, 3 (1st Cir. 2014). The court cited *Glik* in affirming the individual's right to film, saying that the activity was "carried out in public." *Id.* at 7. *Project Veritas Action Fund v. Rollins*, another First Circuit case, acknowledged a lack of clarity in this standard. *Project Veritas Action Fund v. Rollins*, 982 F.3d 813, 827 (1st Cir. 2020), *cert. denied*, 142 S. Ct. 560, 211 (2021). This court consolidated *Glik* and *Gericke*, saying their settings encompass "inescapably public spaces" like "traffic stops" and "public parks," but neither case confirmed nor denied the capacity of a "publicly accessible private property" to count as a "public space." *Id.* In *Fordyce v. City of Seattle*, an individual was arrested after filming police officers and their interactions with a crowd at a protest. *Fordyce v. City of Seattle*, 55 F.3d 436, 438 (9th Cir. 1995). After his charges were dismissed, he brought an action against the city for violation of his first amendment rights. *Id.* The court in this case ruled the plaintiff had a "First Amendment right to film matters of public interest." *Id.* at 439.

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Glik and *Gericke* have both affirmed a right to record in "public." This is useful because it effectively includes public property, which was the setting for both cases. Part of Whitten's charges include her recordings made on public property, in the back of a police car. This setting qualifies as a public space that is "inescapably" public, as it matches up to the *Rollins* standard closely. The interior of a moving police car is hardly different from the traffic stop in *Gericke*. Both take place on public property, and can be viewed by anyone on the street. Thanks to elaboration on the public area constraint from *Gericke*, Whitten's recording inside a publicly-owned police car is very closely analogous to the car in *Gericke* and requires almost no speculation as to whether this location is included in *Glik*. Therefore, Whitten's filming inside a publicly-owned police car is included in the rights affirmed in *Glik*.

However, these cases have not elaborated on whether this includes privately-owned property that acts as a public forum, like the site of Whitten's protest. Whitten's public protest took place at Wild Animal Safari, and included over twenty individuals. (R. at 3–4.)

The analysis in determining whether police should be free from recordings on private property is a determination of what, if anything, has changed in the transfer of setting from public to private property. In other words, the question is whether police officers should have more of a right to privacy, and whether the public has any less of an interest in observing their behavior.

Individuals are only afforded the right to record police officers while they are performing their duties. Just as this public interest no longer exists while their